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Supreme Court, U.S.
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No.

In the

SUPREME COURT OF THE UNITED STATES

LUCY R. EDWARDS,
Petitioner,

v.

BOARD ON PROFESSIONAL RESPONSIBILITY,
Respondents.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the District of Columbia Board on Professional Responsibility establish by clear and convincing evidence which is the standard for quasi-criminal proceedings such as attorney discipline matters, that Petitioner misappropriated client funds ? Is the decision of the DC Court of Appeals conflict with its own case law and with comparable decisions in other jurisdictions?

II. Did the District of Court of Appeals Bar Counsel violate Petitioner's due process rights under the Fifth Amendment and Sixth Amendment to the U.S. Constitution by bringing its Specification of Charges, twelve years after the matter was first brought and three years after its investigation was over?

III. Was misappropriation the appropriate determination in light of Petitioner having been sanctioned to a six month suspension with a year's probation in 2005 on conduct that arose during the same time frame the instant conduct complained of occurred?

PARTIES TO THE PROCEEDINGS

The names of the parties to this proceedings are Lucy R. Edwards, Petitioner (hereinafter called, "Petitioner" or "Edwards") Nigel L. Scott, Esquire, (hereinafter called, "counsel for Petitioner"), Timothy J. Battle, Esquire (hereinafter called, "former counsel for Petitioner"). The Respondents are Ross T. Dicker, Esquire, Assistant Bar Counsel, (hereinafter called, "Respondent" or "Assistant Bar Counsel") to the District of Columbia. Court of Appeals, Wallace E. Shipp, Esquire, (hereinafter called, "Respondent" or "Bar Counsel"), DC Court of Appeals, Board on Professional Responsibility, Hearing Committee Number One (hereinafter, called "Hearing Committee") and DC Court of Appeals Board on Professional Responsibility (hereinafter called, "the Board").

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OPINION BELOW

The Opinion of the DC Court of Appeals is reported at 990 A2d 501(D.C. 2010).

JURISDICTIONAL STATEMENT

Petitioner noted Exceptions to the DC Court of Appeals to the Report and Recommendation of the Board recommending that she should be disbarred for intentional and reckless misappropriation regarding her handling of alleged client funds. Petitioner had earlier noted Exceptions to the Report and Recommendation in a prior matter involving her handling of a lost last Will and Testament. The Hearing Committee in that case recommended that the Respondent should be sanctioned to a thirty day suspension from the practice of law. (Hearing Committee No. 3). Bar Counsel sought over the objections of Petitioner and was granted a consolidation of these two disciplinary matters.

On March 11, 2010, the DC Court of Appeals entered a Memorandum Opinion upholding the recommendations of the Board on Professional Responsibility and disbarred Edwards from the practice of law. The Appellate Court also suspended Edwards for thirty day to run concurrent to the disbarment. Edwards filed timely a petition for rehearing or in the alternative, rehearing en banc. On September 14, 2010, the DC Court of Appeals entered an Order denying

Edwards' Petition for Rehearing or for Rehearing En Banc.

Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction is also invoked under the Fifth Amendment and Sixth Amendment to the United States Constitution.

RELEVANT PROVISION INVOLVED

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment: to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy

> and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner became a member of the Bar of the District of Columbia since 1965. She was admitted to the Bar by the U.S. Court of Appeals, District of Columbia Circuit by examination and later enrolled as a member of the DC Court of Appeals, assigned Bar No. 197020. On March 7, 1994, Mark Green ("Green or the "Client") retained Petitioner to assist him in filing a Voluntary Chapter 13 Petition in the United States Bankruptcy Court for the District of Columbia, primarily to prevent an imminent foreclosure on his condominium. Mr. Green had fallen behind on his mortgage and condominium fee payments on his property located at 1736 Willard Street NW and the property was up for foreclosure sale on March 9, 1994.. Mr. Green agreed to pay Petitioner a flat $1,000.00 fee for her preparation and filing of his Petition and he agreed to pay the $160.00 filing fee. The client also signed a retainer's agreement wherein he agreed to pay Edwards $150.00 per/hr.

for any additional work on his case. Mr. Green paid $700.00 of the retainer's fee on March 7, 1994 and the remaining $460.00 on April 9, 1994 which made up the remainder of the retainer's fee plus the filing fee.

On March 9, 1994, Petitioner filed the Voluntary Bankruptcy Petition on behalf of her client and the petition was a "skeleton" Petition consisting of *inter alia* a listing of Green's creditors, and a statement of attorney compensation. The Petition listed three secured creditors: GE Capital Mortgage Services, Inc. ("G.E. Capital"), who was owed about $45,000; a second trust for $8,000.00, and the condominium association that was owed $7,500. Edwards filed the entire Bankruptcy package[1] on behalf of her client on April 6, 1994. The Bankruptcy Court entered an Order confirming Mr. Green's Chapter 13 Plan on June 3, 1994.

Shortly after Mr. Green's Plan was confirmed by the Bankruptcy Court, G.E. Capital filed a motion for relief from the automatic stay in light of Green's failure to make his post petition mortgage payments. The Motion to Lift Stay was filed on August 18, 1994. Petitioner, in turn, met

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[1]The retainer's fee covered Edwards' filing a complete Bankruptcy Petition including Schedules, Financial Statements and the Bankruptcy Plan, attendance to the Creditor's meeting and the confirmation hearing, and securing confirmation of the Plan.

with her client and after reviewing the records, successfully negotiated a consent agreement that gave her client the ability to catch up on his post petition arrears. On September 4, 1994, the U. S. Bankruptcy Court entered a Consent Order providing for Mr. Green to cure his post petition arrears with G.E. Capital by paying to G.E. the equivalent of one mortgage payment ($1,180.00) that day and by making the mortgage payment plus extra payments until December, 1994 to catch up. The Court denied the Motion to Lift the Stay pursuant to this arrangement. Mr. Green provided Edwards with a cashier's check made out to G.E. Capital in the amount of $1,180.00 which Petitioner promptly forwarded to the creditor on 9/14/94; she also sent her client a letter informing him that she had forwarded his check and reminded him of his new payment obligations.

Mr. Green failed to honor the consent agreement with G.E. Capital and on January 19, 1995, the note holder filed an affidavit of breach in the Bankruptcy Court notifying that Court that Green had to pay $4,860.68 to cure his breach plus attorneys fees. G.E. Capital mailed copies of the affidavit to both Mr. Green and Edwards. Mr. Green failed to bring the arrears current and on March 21, 1995, the Bankruptcy Court lifted the automatic stay allowing G. E. Capital the right to foreclose on Green's property. Pursuant to the client's failure to cure his breach resulting in Green's condominium going into foreclosure, the following series of events took place as fully outlined below.

On March 21, 1995 (and subsequent dates), Edwards and Mr. Green conversed about her contacting the Substitute Trustee for G. E. Capital to attempt to negotiate a proposed forbearance agreement to prevent foreclosure on Green's property. Both parties testified at trial before Hearing Committee No. One that Green needed to come up with between $3,000-$5,000.00 if G. E. Capital agreed to forbear. Edwards specifically testified that this was only a proposal which she believed that the Substitute Trustee (Gregg Britto, Esquire) could take to G. E. Capital and it was not based on having any money from Mr. Green that she was holding for a forbearance, nor had Mr. Green given her any money towards a forbearance. Edwards specifically testified that this was the figure that she came up with if a forbearance agreement was accepted and weighing in the balance all of Mr. Green's secured debts that could have resulted in a foreclosure if either of the other creditors initiated foreclosure proceedings.

Petitioner, on April 10, 1995, faxed a proposed forbearance agreement dated March 29, 1995 proposing that Mr. Green would pay $3,000.00 initially and catch up on the arrearage by February, 1996 by making additional payment plus the current mortgage payments. The Substitute Trustee for G. E. Capital never acted on the proposal. During the spring and summer of 1995, Petitioner and Mr. Green discussed the possibility of reducing his bankruptcy payments, pursuant to his Plan but no modification took place.

On May 17, 1995 and pursuant to a telephone conversation that Edwards had with her client on the previous day, Mr. Green brought in a cashier's check for $2,000.00 made payable to Petitioner to satisfy her request, that he bring in a payment towards his legal fees for *inter alia* Petitioner's research, preparation of a proposed forbearance agreement and for Edwards' negotiations in that regard along with other work on his bankruptcy case. Edwards notes here that the check was made payable to her with no indication on the memo section that the money was earmarked for payment to the Substitute Trustee or to G. E. Capital. Edwards also notes that there is no testimony in the record that she testified that the $2,000.00 that Mr. Green brought in was to pay for attorneys fees in addition to some some of that amount going towards his debts as the Report and Recommendation of the Board suggests. Edwards actually testified that Mr. Green indicated in conversations with her and her staff that "he owed as attorneys' fees and would pay some attorney's fees and would also make money available for the forbearance agreement if I could get one." (Mr. Green actually indicated that he would bring in $2,000.00 on May 17, 1995 and then bring in $3,000.00 later making a total of $5,000.00 altogether. The money was received by a staff member on behalf of Petitioner.

The client testified in this regard that he brought in the $2,000.00 for Petitioner to hold on

his behalf and use to try to forestall the foreclosure procedures on his condominium or to settle the arrears on his mortgage payments. Further, Mr. Green testified that he, Petitioner, and Petitioner's then, office manager, Walter Johnson agreed that money would go into an escrow account. Neither Edwards nor her office manager (based upon Edwards' testimony) recalled this conversation, that is, that Respondent agreed to put the money into escrow. In fact, the Hearing Committee and the Board determined that Mr. Green was not a credible witness; discredited the client's testimony and the Hearing Committee stated (and the Board concurred) that it based its conclusions upon the record of deposits and disbursements from Edwards' trust account and not on Mr. Green's testimony.

The Board stated in its Report and Recommendation that "although Edwards had a legitimate basis to seek additional attorney's fees from her client, her actions were inconsistent with the notion that any part of the $2,000 was for payment of an attorney's fee." Within this context, the Board outlined the main basis for this conclusion to be that Edwards on May 19, 1995, Edwards deposited the $2,000 check from Mr. Green into her escrow account and when Mr. Green asked for a refund of $1,000.00 back from the $2,000.00 to cover some pressing expenses including the cost of recovering his car from an impound lot and for moving to New York City for graduate school, Petitioner deposited $1,000.00 into the escrow account and then gave Mr. Green a

check made out to him for $1,000.00 that included the notation "Return of funds from escrow."

Once the Board determined that the funds were Mr. Green's funds, it outlined the various deposits and withdrawals made from and into Edwards' Trust Account at Rigg's Bank. It is not necessary to detail these facts herein; they are clearly detailed in the Hearing Committee's and the Board's Report and Recommendation submitted to this Court as part of the Record on Appeals. It is also not necessary to detail the activity in the Riggs Bank Trust Account in that the mere fact that Edwards deposited the $2,000.00 cashier's check into her Trust Account, made a decision to return $1,000.00 of the money back to Mr. Green to help him cover some of his expenses pertaining to his car and moving, and the fact that she deposited the refunded money back into the Escrow Account, and gave Mr. Green a $1,000.00 refund by issuing a check with "return of funds from escrow" provides no basis for the Board's determination under the 'clear and convincing evidence standard' that the $2,000.00 constituted the client's funds as opposed to Edwards' legal fees.[2]

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[2]The record in this case reveals that Edwards during the period between 1995-1996 would routinely deposit funds belonging to herself into her trust account or deposit funds belonging to a client into her operating account. This practice resulted in Petitioner having come before the Board in four other cases where the conduct was occurring at the same time that this matter arose. The DC Court of Appeals ruled that this fact alone did not produce clear and convincing evidence of misappropriation on Edwards' part.

The Proposed Facts as outlined by the Board in its Report and Recommendation at indicated that Mr. Green was satisfied with the communications that he had with Petitioner up until he left Washington, DC. Mr. Green moved from Washington, D.C. to an apartment in the SoHo neighborhood of New York City in July, 1995 and obtained a tenant to occupy his condo in Washington, D.C. The client also had a management company handle collecting the rent (which was about $600-700.00 per month). It did appear that the rents collected by the management company went towards Mr. Green's condo fees. On August 17, 1995, Mr. Green's condominium association, through its counsel, wrote to Edwards notifying her that Mr. Green had not paid his monthly assessments that year and owed $1,584.00. Subsequently, Mr. Green's condominium went into foreclosure. Edwards did not receive any notice of any foreclos re from the client's creditors.

Mr. Green wrote to Edwards on June 17, 1996 at her office located on 1424 K Street, NW inquiring about the status of his condo due to the fact that he received word that his condominium had gone into foreclosure and he asked why she had not notified him since she had $3,900.00 of his money in trust." Petitioner had contacted Mr. Green's creditors in the Spring of 1997 to see if anything could be done to save the condo. Following her move from 1424 K Street NW to 3103 Georgia Ave NW and during the move, Petitioner lost Mr. Green's letter to her, but notes

here that the client was well aware that he had made no payments to the condo association and no forbearance agreement was in place to reinstate his loan with G. E. Capital.

On August 30, 1996, Mr. Green filed a Complaint against Edwards with the Office of Bar Counsel explaining that he learned from a management company that his condominium had gone into foreclosure, that Edwards had not responded to his letter of inquiry sent in July, 1996 (the incorrectly identified that date as July, 2006) and stating that he provided $3,900.00 in trust to monitor and advise him on his matter.).[3] Respondent, Assistant Bar Counsel decided to investigate the matter and on October 2, 1996, Bar Counsel sent a letter to Edwards at her Georgia Avenue address accompanied by Mr. Green's letter of Complaint and requested a response by October 14, 1996.

On November 4, 1996, the Bankruptcy Court granted its Trustee's Motion to Dismiss Mr. Green's Petition and dismissed the case with prejudice. Bar Counsel sent Petitioner another letter of inquiry on October 21, 1996 demanding a written response to Mr. Green's allegations. On November 1, 1996, Petitioner left Bar Counsel a

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[3]The Hearing Committee and the Board determined that Mr. Green had only provided $2,000.00 to Petitioner the purpose of which is in dispute by Petitioner who states that this money constituted her legal fees. See Petitioner's bill outlining her services on behalf of Mr. Green.

recorded message regarding her filing a response to the Complaint filed by her client and on November 5, 1996, she advised a law clerk for the Office of Bar Counsel that she would respond to Bar Counsel's inquiries and to Mr. Green's allegations shortly. Edwards subsequently met with Assistant Bar Counsel who informed her that he would move to compel a written response if she did not submit a response soon. On December 18, 1996, Edwards spoke with a law clerk at the Office of Bar Counsel and she informed the clerk that she had been ill and would seek additional time to file a written response.

On December 20, 1996, Edwards faxed a letter to Assistant Bar Counsel seeking an extension of time to submit her written response and explaining that she had been suffering with various health problems, including migraine headaches, glaucoma, a sinus infection and the flu. She also explained that she was struggling to meet client obligations after moving her Offices and becoming a solo practitioner. Petitioner also testified at trial that she was dealing with several other concurrent Bar matters initiated by Bar Counsel at the same time that the Green matter surfaced. . Edwards informed Assistant Bar Counsel that she would contact him before Christmas to reschedule the Green case and two other matters pending with Bar Counsel. Petitioner visited Bar Counsel's Office on December 24, 1996 seeking a meeting with Assistant Bar Counsel who was unavailable.

Instead of responding to Edwards' written request for an extension of time within which to file a written response to Mr. Green's Complaint, Bar Counsel, after notifying Edwards that he would move the Board to issue an order compelling her to submit a response, filed a motion to compel Edwards' written response. On February 12, 1997, the Board ordered Petitioner to submit a response to Bar Counsel's letters and to Mr. Green's allegations within 10 days and caused a copy of the Board's Order to be hand-delivered to Petitioner. On March 12, 1997, Bar Counsel filed a Petition and Specification of Charges alleging that Petitioner violated Rule 8.4(d) and DC Bar R. XI§2(b)(3) for her failure to comply with the Board's Order and alleging that Edwards was guilty of conduct that seriously interfered with the administration of justice.

Petitioner subsequently retained counsel and on April 11, 1997, Petitioner's attorney wrote to the Hearing Committee assigned to the case and requested additional time to review evidence and prepare an answer to the Specification of Charges and to request that the hearing set for April 29, 1997 be postponed for 30 days. On April 30, 1997, Petitioner filed a written response to Bar Counsel's letters of inquiry and to Mr. Green's allegations. The Response included a summary of the work that Petitioner had done on behalf of Mr. Green and a Statement detailing the work between March 1994-April 1996.. Petitioner testified that she was reluctant to send any bill to Mr. Green, in light of Bar Counsel's investigation of her handling of Mr.

Green's case. Edwards maintained that the Response in 1997 did not detail all of the work that she did on behalf of Green but represented her best memory of her representation of Mr. Green at that time; she also indicated that the letter was not a perfect summary in that her office manager was no longer available to help prepare it.

Petitioner, through her attorney provided an Answer to Bar Counsel's Specification of Charges on May 12, 1997. She outlined several factors for her delay in submitting a written response to Bar counsel's inquiries. These included (1) during her August 1996 move, she did not promptly receive Bar Counsel's of inquiry because she did not immediately notify the DC Bar of her new office address. After her move, she operated without staff support, had difficulty retrieving records and files including Mr. Green's file and her bank records and she had health issues coupled with trying to deal with several other Bar matters involving her handling of client funds in other cases. On May 19, 1997, Bar Counsel moved the Board to dismiss the Petition and Specification of Charges after having received responses from Petitioner. On May 27, 1997, the Board issued an Order granting Bar Counsel's Motion to Dismiss without prejudice.

On October 21, 2005, Bar Counsel re-instituted its Petition and Specification of Charges and charged Respondent with eight violations. These included violations of Rules 1.15(a), 1.15(b), 1.16(d), Rule 1.4(a), 8.1(b), 8.4(d) and Bar Rules XI §§§8(a) and 2(b)(3). Following a trial before

Hearing Committee No. One, the Committee found that Petitioner was guilty of at least six of the violations the exception being a violation of Rule 1.4(a) and Rule 8.4(d). The Hearing Committee issued its Report and Recommendation on December 26, 2007 and recommended that Edwards be disbarred for intentional misappropriation and found that Edwards was guilty of failing to respond to a disciplinary authority and failure to comply with an Order of the Board in violation of Rules 8.1(b), 8.4(d) and DC Bar R XI§ 2(b)(3). The Board, following post Hearing Committee briefing and a hearing, adapted the Report and Recommendation of Hearing Committee No. One and issued its Report and Recommendation on June 12, 2007 that Respondent be disbarred. The Board also found that Bar Counsel did prove by clear and convincing evidence that Petitioner violated Rule 8.4(d). Edwards noted exceptions to the Report and Recommendation of the Board and Bar Counsel noted an opposition to Edwards' exceptions.[4]

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[4] On or about October 3, 2002, the DC Court of Appeals remanded the case involving four separate matters brought by Bar Counsel and all stemming from Respondent's alleged reckless misappropriation in those matter. See In re *Edwards*, 808 A.2d 476 (D. C. 2002)(*Edwards I*). The Court found that Respondent did not misappropriate funds in three of the client matters. The Court remanded the case to the Board for its determination of whether the misappropriation that occurred in the one case (Ansah) was the result of reckless misappropriation or simple negligence. All four of these cases and the Green matter arose between 1995 and 1996. The DC Court of Appeals sanctioned Petitioner to six months

In the second consolidated disciplinary matter (06-BG-1480) involved Petitioner's failure to locate a Will that she drafted in 1993 for her client, William Dickerson, following his death in1998. Petitioner who did not believe that she possessed the original copy of the Will, located the Original Will around 2001 and returned it to the Decedent's heir. Respondent, Bar counsel, pursuant to the Complaint of the heir, Shirley Dickerson-Fairley, brought Specification of Charges on January 21, 2005. The matter was heard by the Hearing committee on November 1, 2005, three years after Bar Counsel's investigation began, 8 months after *Edwards II* was decided by the Court of Appeals and concluded on December 2006, and six months after Petitioner had successfully completed her sanction and was restored to the practice of law. Edwards reserves the right to address this issue in a Supplement.

On March 11, 2010, the DC Court of Appeals entered its Opinion disbarring Petitioner from the Practice of Law for reckless and intentional misappropriation in her handling of Mr. Green's funds and suspending Edwards from the practice of law for 30 days for her handling of the lost Will in

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suspension and a year of probation, along with requiring her to submit to monitoring by a financial and office practice monitor to manage client funds entrusted to her and manage her office files. The Court also required Petitioner to take a CLE course involving proper handling of trust funds. See In re *Edwards*, 870 A.2d 90 (2005)(*Edwards II*). Respondent successfully completed the six months' suspension, the probation and the CLE course by July 26, 2006.

the Dickerson Matter. Both sanctions ran concurrently. In re *Edwards,* Nos. 06-BG-1480 & 07-BG-608 (D.C.C.A March 11, 2010).(*Edwards III*). On December 16, 2010, denied Petitioner's Petition for Rehearing or in the Alternative Rehearing En Banc. (D.C. App. R. 35(a)(1)(A)).

REASONS FOR GRANTING PETITION

A. The Board Failed to Establish by Clear and Convincing Evidence Which is the Standard for Quasi-criminal Proceedings, Such as Attorney Discipline Matters that Petitioner Misappropriated Client Funds. The Decision of the DC Court of Appeals Is In Conflict With its Own Case Law and With Comparable to Decisions in Other Jurisdictions

The Division of the DC Court of Appeals stated in its Opinion at p. 3-4 that it agreed with Petitioner that "at least the pivotal "threshold issue" here (the Board's term) of whether Petitioner held the $2,000.00 in trust for Green required proof by clear and convincing evidence before it could be answered affirmatively." The Division of the DC Court of Appeals went on to state, however; (that none of this helps Petitioner, in that she did not raise " the issue of application of the wrong standard of proof in her brief to the Board (which accordingly did not address it), and, indeed failed to raise it with the court until her reply brief-both reasons why we would be within our authority to ignore it." The Court cited In re *Artis,* 883 A.2d 85,

97 (D.C. 2005)(" We have held consistently that an attorney who fails to present an issue to the Board waives it and cannot present it for the first time to this Court."), *Stockard v. Moss,* 706 A.2d 561, 566 (D.C. 1997)("It is the long standing policy of this court not to consider argument raised for the first time in a reply brief.").

The standard of proof is not an "issue" or fact that must be raised by Petitioner before the trier of fact can apply it. In other words, Edwards is not charged with the responsibility of raising the applicable standard before the Board can consider it. It is the prosecutor's (Bar Counsel's) duty to prove by clear and convincing evidence that misappropriation took place. Within this context, the Board's thorough "painstakingly considered report adopting for the most part the likewise meticulous findings of fact by Hearing Committee No. One-appended to the Divisions opinion, does not necessarily prove misappropriation by clear and convincing evidence. Indeed, it did not.

Here, the determination of whether the money belonged to Green or Edwards was not proven by clear and convincing evidence that it was Green's and not Edward's. The evidence reveals that Green brought in $2,000.00 which he stated in his Complaint was to be held in trust to work out a forbearance agreement.[5] There was no

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Green's testimony was not found credible by the Hearing Committee. Edwards' testimony was not found

forbearance agreement in place and no creditors to pay. The $2,000.00 check that Green gave Edwards had no indication on the memo line that the money was intended or earmarked to pay to pay on or towards a forbearance agreement (unlike the situation in the Ansah matter-*Edwards II*). The forbearance agreement did not exist. The record here also reveals that Green knew the difference between client funds and funds to pay for legal work in that when he paid his mortgage bill or other bills, through Edwards, he specifically made his checks out to the creditor and stated in the memo sections, i.e., mortgage.

The evidence clearly supports the fact that Green gave Edwards that $2,000.00 for her legal work ("to work out a forbearance"). The notion by the Board that Green was storing up money with Petitioner in case a forbearance was accepted is ludicrous and is simply not supported by clear and convincing evidence. In fact, it does not even meet the legal standard for determination of client funds that this Court requires to prove

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credible by the Hearing Committee. The Hearing Committee and the Board stated that reliance was therefore placed on Petitioner's handling of her trust accounts. The Board cannot later use Green's words or Edwards' words to derive the words trust funds (Green's words) or brought in funds to satisfy his creditors (Edwards' words) if both testimonies were discredited to reach the pivotal threshold decision that the money belonged to Green. Petitioner placing the money that she received from Green into the trust fund is not evidence under the clear and convincing evidence standard that the money belonged to Green.

misappropriation. The fact that Edwards put this money into her escrow account is not evidence that the money was trust funds; it is evidence that she placed the money into the wrong account. The Board's thorough review of Edwards' trust account activity when it failed to establish that the money was client funds by clear and convincing evidence does not prove that misappropriation occurred let alone the reckless factor to warrant the harsh sanction of disbarment.

The decision here conflicts with recent controlling authority by the Court of Appeals, In re *Anderson,* supra, as to the criteria for reckless misappropriation in multiple cases involving similar conduct over a period of time when one of the cases was decided after the sanction was entered for the first two cases. The appropriate question here is, does the facts in the Green matter overcome the presumption that Edwards has already been sanctioned and rehabilitated for similar conduct prior to the instant decision and has a 'ripeness' factor for reckless/intentional dishonesty entered in this case as In re *Anderson,* 979 A.2d (D.C. 2009), to support a sanction of disbarment? Edwards maintains that this case is clearly distinguishable from *Anderson* (the 2009 case) and if anything, it is more analogous to the situation in *Anderson II,* to the extent that, the Anderson Board found that a reprimand for the second instance of misappropriation after respondent was sanctioned to six months suspension for the first instance, was preferable to disbarment.

Bar Counsel has not proven by clear and convincing evidence that Edwards' conduct demonstrated misappropriation that was intentional let alone reckless. In fact, Bar Counsel did not prove that Edwards misappropriated any of Mark Green's funds. The DC Court of Appeals has held since In re *Addams,* 579 A.2d 190 (D.C. 1990)(en banc) that where Bar Counsel proves that a respondent has misappropriated client funds entrusted to the lawyer, disbarment is the appropriate sanction in virtually all cases unless, it appears that "the misconduct resulted from nothing more than simple negligence. In re *Addams,* supra; see also, In re *Micheel,* 610 A.2d 231 (D.C. 1992); In re *Pels,* 653 A.2d 390 (D.C. 1990) and other related cases of disbarment wherein intentional or reckless misappropriation was proven by clear and convincing evidence.

The Court has further rejected in decisions since *Addams* and other cases involving reckless misappropriation the proposition that recklessness can be shown by inadequate record-keeping alone combined with commingling and misappropriation. In re *Anderson,* 778 A.2d 330 (D.C. 2001)(quoting In re *Reed,* 670 A.2d 506 (D.C. 1997)); In re *Edwards II,* supra, In re *Chorozej,* 624 A.2d 434, 436 (D.C. 1992). The Anderson Court in 2001 (*Anderson I*) quoting BLACK'S LAW DICTIONARY (7TH ed. 1999) defines recklessness as a "state of mind which a person does not care about the consequences of his or her action;" 57 Am.Jur.2d Negligence § 302 (1989)("[R]eckless misconduct

requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts that would disclose this danger to any reasonable person."). Petitioner maintains that the Bar Counsel failed to make a showing that her conduct in the *Green* matter was the result of reckless or intentional misappropriation of the kind laid out by this Court in its mosaic on what constitutes a reckless or intentional misappropriation. Moreover, the evidence that Petitioner's trust checking account may have fallen below the amount of funds given to her by Green, nor the fact that Edwards refunded half of the money to Green per his request for his personal reasons without more fails to carry the weight of "reckless" or "intentional" misappropriation to warrant the ultimate sanction of disbarment as opposed to a lesser sanction. Here, the stringent proof that Edwards demonstrated a reckless disregard for the maintenance of Green's funds, particularly in view of the fact that the Board made no distinction, indeed it could not make any distinction, in what Green's bills were that Respondent was obligated to pay simply did not exist.

The Division opined at page 1 and 4 of its Opinion :

> "we accept the Board's recommendation of disbarment based upon its thorough, painstakingly considered report adopting for the most part the likewise meticulous findings of fact by Hearing Committee No. One-which

> we append to this opinion.... Moreover, the evidence supports equally, convincingly, the Board's conclusion that respondent was at least reckless in her misuse of the entrusted funds. *Cf.* In re *Berkowitz*, 801 A.2d 51 (D.C. 2002)."

Turning to the Board's reasoning for its finding of reckless or intentional misappropriation on respondent's part, the Board stated in pertinent part:

> Here Respondent's bank records reveal not only that she allowed her escrow account balance to drop below what she owed Mr. Green, but also that she used his money for her own purposes. When she deposited his $2,000.00 and two checks totaling $4,400.00 from Capitol Bus on May 19, 1995, she withdrew $1,400.00 in cash without noting on the deposit slip which clients' $1400 was withdrawn or why. . At the Hearing, she claimed the $1,400.00 represented attorneys' fees that Mr. Green owed her; however, as discussed, supra, that testimony is refuted by the record of her treatment of the $2,000.00 as Mr. Green's property. The next day, Edward wrote a $5,016.77 check to the IRS on behalf of Capitol Bus, even though she had received only $4,400.00 from that client the day before. Edwards claims that Capitol Bus provided her with additional money, but her bank records show no other deposits on behalf of that client around that time. Just before Petitioner

> deposited the Capitol Bus checks, her escrow account balance stood at $386.77. Thus, at least $280.00 of Mr. Green's money went toward covering the difference between what she received from Capitol Bus and what she paid out to the IRS on its behalf.
> Finally, when Mr. Green asked for $1,000.00 back, she was forced to deposit $1,000.00 of the money she had kept for her own purposes into her account before she could write him a check from her escrow account for that amount. If Edwards believed that the $2,000.00 were in fact, her funds, she would have drafted a $1,000.00 check from her personal or operating fund account. The Board also finds its telling, as did the Committee, that Edwards check returning $1,000.00 to her client carried the notation "Return of Funds from escrow." **BX 16 at 125.** id.

The standard of proof for reckless or intentional misappropriation utilized by this Board and the Division falls far short of that employed by other Boards and other legal authority opined by the DC Court of Appeals in deciding the reckless factor to reach the *per se* conclusion of disbarment outlined by the *Addams* court. The facts of this case revealed that Petitioner commingled her own funds with client money when she place the $2,000.00 given to her by Green in the trust account. The facts further reveal that Bar Counsel, other than crediting (even though the Board discredited that testimony) Green's bald assertions

that he gave Edwards money to hold in trust to secure a forbearance failed to meet its burden of proof of any wilful disregard or conscious indifference for the security of Green's money. In re *Anderson,* 778 A.2d 330, 338 (D.C. 2001); In re *Addams,* supra. The facts do not even reveal a single debt that Edwards was supposed to pay on Green's behalf to support the Board's conclusion that reckless misappropriation, let alone any misappropriation occurred. There was no forbearance agreement in place, no listing of what bills the $2,000.00 was earmarked for. All of these facts taken together and taken even in the light most favorable to showing deference to the Board's recommended sanction, including the deposit of the one thousand dollars from Petitioner's operating account into the trust account with the notation "Return of funds from Escrow," do not make a case for reckless misappropriation. The case is that Petitioner improperly place her own money into that escrow account. The case is made that Edwards (if the Board had properly reviewed the previous disciplinary cases that occurred during the same time as the instant matter) during the period when the misconduct occurred was routinely using her escrow accounts in the same manner in which she used her operating accounts and placing her money and/or client money into either type of account.[6] It was this practice that ultimately led to

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If the Board had treated the Green matter, since the conduct occurred at the same time as the other matters resulting in *Edwards I and II,* as part of the pattern of

the imposition of the six month sanction/suspension added with the probationary period and the use of the practice monitor in 2005. The case is not made by clear and convincing evidence or any other standard that Petitioner committed reckless or intentional misappropriation of Green's funds to warrant the harsh sanction of disbarment of *Addams*, supra.

The DC Court of Appeals' opinions in two cases, namely In re *Anderson*, supra (*Anderson I*, supra) and In re *Anderson* (*Anderson III*, supra) is helpful to Edwards' argument here of the stringent and comprehensive reasoning that is applied in cases where a sanction has already been entered in prior cases, brought after sanctions were entered in the first two and where the conduct complained of was similar and occurred at the same time as the other prior matters. The *Anderson, III,* Court looked at the issue of whether Petitioner's conduct in the last matter "ripened" into reckless misappropriation by his continued pattern of using client settlement funds as his own even after she

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confusion and mismanagement of Petitioner's accounts during that time, it would not have concluded that the transfer of the $1,000.00 from the operating account into the trust accounts as evidence of reckless misappropriation. Edwards maintains that Bar Counsel's bringing this case years after the conduct occurred and the Board's failure to view the *Edwards I and II,* cases (although submitted as aggravating circumstances), to get a feel for what was actually occurring in Edwards' accounts during that time, contributed to its having reached the harsh sanction of reckless misappropriation.

was sanctioned to a six month suspension (*Anderson I*, supra), and given a reprimand by the Board (*Anderson II*). Edwards notes that *Anderson III*, supra was decided on September 2, 2009, after briefing and oral argument was concluded in the instant case but before the Division reached its decision in *Edwards III*, supra and should therefore be controlling or extremely relevant here.

Briefly, in In re *Anderson I, II, and III* supra, Bar Counsel brought over a seven year period three cases of misappropriation against respondent growing out of his keeping for his own personal use, funds that belonged to medical providers or to his clients resulting from personal injury settlements (PIP). All of these cases occurred in the 1990's. In *Anderson I*, 778 A.2d 330 (D.C. 2001), respondent was suspended from the practice of law for six months after this Court found that respondent had misappropriated PIP payments belonging to his client's medical providers. In *Anderson II*, Bar Docket No. 224-98 (BPR July 21, 2001), the Board imposed a reprimand for Respondent's late payment of proceeds to that client's medical providers. Among the circumstances viewed by the Board was the fact that all of the conduct occurred prior to respondent's six-month suspension in 2001 "for the events in *Anderson I*, supra and little deterrent effect could be perceived for a new suspension upon Respondent reinstatement for conduct that had occurred prior to the suspension and that was deemed less prejudicial to the client than the conduct for which Respondent had already served

a suspension." In re *Anderson,* 979 A.2d 1206 at 1219 and 1220.

In *Anderson III,* Respondent misappropriated settlement proceeds by failing to pay his client's medical provider until 2006. The settlement in *Anderson III* occurred in May, 1996 and Respondent falsely represented to the client that he would imminently pay the third party providers and deducted those amounts from her share of the settlement. Id at 1220. Almost four years after the sanction of the six month suspension and nine years after the settlement disbursements in question, Bar Counsel brought its specification of charges which resulted in Anderson's disbarment from the practice of law. The key and critical difference in *Anderson III* was that for the four years after respondent was sanctioned to a six-months suspension from the practice of law, he led his client to believe that he had paid her medical providers and his non-payment to her medical providers caused her to incur credit problems. The record reflected that Anderson knew by 2001 that he had not paid his client's medical providers and since he was put on notice that his actions constituted misappropriation in this latter case, the payment of the medical provider in 2006 when he was about to incur another sanction (*Anderson II*) and the same argument that he "forgot to pay the medical providers" as an excuse for delaying 4 years to pay (after the sanction) was consistent with a reckless disregard in his treatment of his client's funds. It was intentional and dishonest. Here, the Court

viewed that *Anderson's* actions in the latter case (*Anderson, III,* supra) revealed that " Respondent still lacks an appreciation of his responsibilities to protect his clients' interests in settlement funds and to deliver promptly to creditors of the clients' monies that had been designated for them." *Anderson,* supra at 1208. The DC Court of Appeals concluded that Anderson's conduct in the latter case proved that "his misappropriations were reckless from the onset and compounded by dishonest conduct around the time of his suspension" and disbarred Anderson in 2009. See In re *Anderson* III in its entirety.

When the Anderson factors are applied to the instant case, the elements of reckless misappropriation on this Petitioner's part are clearly lacking. First, Edwards (similar to Anderson) was suspended from the practice of law for six months (in 2005) and put on one year's probation with a practice monitor for her misappropriation of client's funds in one instance. There, the Court stated that misappropriation was clearly proven in that the client listed on his check that he was paying his gas bill. (1996) Second, she committed no acts or potential acts of misappropriation since her sanction in 2005. Unlike Anderson, when he failed to pay the medical advisors after he knew that he had not satisfied their debt, there is no evidence that Edwards believed after 2005 that she misappropriated Green's funds. The Green matter originated around 1996. These facts and other such facts demonstrate that the harsh finding of reckless or

dishonest intent simply cannot be supported by clear and convincing evidence in this Petitioner's case. The Division of the DC Court of Appeals improperly decided not to grant a rehearing on its Division's decision to disbar for reckless misappropriation. Moreover, Petitioner cannot find a single jurisdiction in the United States of America or its territories that enters the harsh sanction of disbarment simply because a lawyer mistakenly deposits its legal fees into his or her trust account.

B. The District of Court of Appeals Bar Counsel Violated Petitioner's Due Process Rights Under the Fifth Amendment and Sixth Amendment to the U.S Constitution by Bringing its Specification of Charges, Twelve Years after the Matter Was First Brought and Four Years After its Investigation was Over

The record reveals that both the Hearing Committee, the Board and Edwards had issues with the 12 year delay in Bar Counsel's bringing its action and the 4 year delay in bringing the action after Respondent had completed her sanction and rehabilitation process. The DC Court of Appeals has decided in previous cases that a delay in bringing a disciplinary case without more may or may not support a violation of due process. In re *Williams*, 464 A.2d 115, 119 (D.C. 1983). Edwards maintains, as she has all along, that the delay particularly the delay after, the suspension and probation period began and ended so that Bar Counsel could use the discipline in aggravation was

highly prejudicial to her. In re *Ruffalo*, 390 U.S., 88 S.Ct., 1222, 1225, 20 L. Ed. 117 (1968).

The Division did not adequately look at this issue when it adopted the recommendation of the Board. The finding by the Board that Edwards caused the delay up to 2001, even if taken as true (which is not the case), does not justify Bar Counsel's bringing its Specification of Charges four years later and after the Court's imposition of the sanction in *Edwards II*. This is consistent with due process violations.

These are quasi criminal proceedings and as such, Petitioner was entitled to a speedy trial under the Sixth Amendment under the U. S. Constitution and a fair trial under Due Process Clauses under the Fifth Amendment of the U. S. Constitution. This is true in that disciplinary proceedings are designed to protect the public and Respondents must be afforded the highest level of Due Process Protections. To wait twelve years to bring an action for no apparent reason other than the Bar Counsel did not score disbarment in the first four cases that were brought at the same time that this case was brought clearly violated this Petitioner's Due Process Rights. The DC Court of Appeals abused its discretion in not dismissing this Bar Complaint against Edwards.

C. Misappropriation, was an Inappropriate Sanction in Light of Petitioner Having Been Sanctioned to a Six Month Suspension with a Year's Probation in 2005 on Conduct That Arose

During the Same Time Frame, the Instant Conduct Complained of Occurred

The issues and arguments raised in the previous sections of this Petition for *writ of certiorari* are adopted and incorporated herein. Edwards argues that the previous sanction of six months' suspension, plus probation that took place in 2005 should have been used in mitigation to the finding of disbarment by the Board and certainly by the DC Court of Appeals. This also true in light of the previous discussion regarding the *Anderson* matter and its treatment by the DC Court of Appeals and in light of the fact that the Board made its decision to recommend disbarment on grounds less stringent than what the DC Court of Appeals normally requires. (i.e., In re *Addams,* supra, In re *Pels,* supra, In re *Micheel,* supra, In re *Anderson III,* (2009), supra). Had the Board considered Petitioner's previous sanction and rehabilitation in mitigation; it may well have reached the conclusion that the Green matter did not warrant disbarment. Edwards reiterates that the element of continuing misconduct after her sanction was completed, was not present in the Green matter as in *Anderson III.*

Here, the Board permitted Bar Counsel to cull out this case from the other cases on the same conduct that came before the DC Court of Appeals in 2000 and presented twelve years later after Edwards had successfully completed her probationary period, had taken CLE in handling IOLTA accounts and in the absence of any evidence

supporting misappropriation after she successfully completed her training. The DC Court of Appeals paid no attention to the facts and simply adopted the Board's Report and Recommendation which also paid no attention to these facts. What good did it do Respondent to have become successfully rehabilitated and allowed to practice law for five years after 2005, only to receive disbarment on evidence that did not support disbarment under the clear and convincing evidence standard and in a case that should have been brought along with the other cases that were brought in 2000.

CONCLUSION

Based upon the foregoing, Edwards prays that this Court will grant the Petition for Writ of Certiorari.

April 18, 2011

/s/ Lucy R. Edwards

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DISTRICT OF COLUMBIA
COURT OF APPEALS

FILED SEP 16, 2010

NO. 06-BG-1480 & 07-BG-608

IN RE: LUCY R. EDWARDS, ESQUIRE
Respondent.
Bar Registration No.197020 BDN:: 488-02 & BDN: 397-96

BEFORE: Washington, Chief Judge: Ruiz, **Reid, Glickman, Kramer, *Fisher, *Blackburne- Rigsby, Thompson, and Oberly, Associate Judges; and *Belson, Senior Judge.

ORDER

On consideration of respondent's petition for rehearing or rehearing en banc, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

** Associate Judge Reid has recused from participating in this matter.

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DISTRICT OF COLUMBIA COURT OF APPEALS

FILED 03-11-10
District of Columbia
Court of Appeals
by A-Chapper
Joy A Chapper
Acting Clerk

IN RE: LUCY R. EDWARDS, ESQUIRE

Respondent

A Member of the Bar
of the District of Columbia Court of Appeals
(Bar Registration No. 197020)

On Report and Recommendation
of the Board on Professional Responsibility
(Bar Docket Nos. 397-96 & 488-02)

(Argued May 27, 2009 Decided March 11, 2010)

Nigel L. Scott for respondent, who submitted her brief pro se.

Ross T. Dicker, Assistant Bar Counsel, with whom *Wallace E. Shipp, Jr.*, Bar Counsel, and

Judith Hetherton, Senior Assistant Bar Counsel, were on the brief, for Office of Bar Counsel.

Before FISHER and BLACKBURNE-RIGSBY, *Associate Judges*, and BELSON, Senior Judge.

BLACKBURNE-RIGSBY, *Associate Judge*: In the principal one of these two consolidated matters (No. 07-BG-608), the Board on Professional Responsibility (the "Board") recommends that respondent be disbarred for intentional or reckless misappropriation of $2,000 that her client, Mark Green, had entrusted to her in 1995 to satisfy his creditors and prevent foreclosure of his condominium. We accept the Board's recommendation of disbarment based upon its thorough, painstakingly considered report — adopting for the most part the likewise meticulous findings of fact by Hearing Committee No. One —

which we append to this opinion. Our brief ensuing discussion assumes familiarity with the Board's report. In the second, unrelated matter before us (No. 06-BG- 1480), the Board recommends that respondent be suspended for thirty days for misconduct involving her failure, for years after the death of her client William Dickerson, to locate and file with the court the original Will she had drafted on his behalf and which named her as the personal representative. Here, too, we accept the Board's recommendation; we discuss this matter briefly in footnote 2, *infra*.

We deem it necessary to answer only a single point made by respondent in opposition to the Board's recommendation of disbarment. She argues that the Board, and implicitly the Hearing Committee, applied the preponderance of evidence standard to resolve the key factual issue of whether her client (Green) gave her the $2,000 to

pay attorney's fees owed her (as respondent contends) or instead entrusted her with that money for use on his behalf (as the Board and Hearing Committee found). Thus, in respondent's view, the Board ignored Bar Counsel's obligation to prove misconduct, including the core factual allegations underlying the charged misconduct, by clear and convincing evidence.

It is, of course, "Bar Counsel's burden to establish by clear and convincing evidence that respondent violated the Rules of Professional Conduct." *In re Mitchell*, 727 A.2d 308, 313 (D.C. 1999). Moreover, we have said that "factual findings [underpinning disciplinary charges] must be supported by clear and convincing evidence." *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001) (quoting *In re Williams*, 464 A. 2d 115, 119 (D.C. 1983)). Whether that rule applies to all such facts, including historical and subsidiary facts

contributing to a mosaic of alleged misconduct, is not something we need consider here. We agree with respondent that at least the pivotal "threshold issue" here (the Board's term) of whether respondent received and held the $2,000 in trust for Green required proof by clear and convincing evidence before it could be answered affirmatively. However, none of this helps respondent for the following reasons.

First, appellant did not raise the issue of application of the wrong standard of proof in her brief to the Board (which accordingly did not address it), and, indeed, failed to raise it with the court until her reply brief — both reasons why we would be within our authority to ignore it. *See In re Artis*, 883 A.2d 85 , 97 (D.C. 2005) ("we have held consistently that an attorney who fails to present an issue to the Board waives it and cannot present it for the first time to this court.");

Stockard v. Moss, 706 A.2d 561, 566 (D.C. 1997) ("It is the longstanding policy of this court not to consider arguments raised for the first time in a reply brief."). Furthermore, it is not at all apparent from the Hearing Committee's report that it applied only a preponderance of the evidence standard in finding that respondent received — indeed, knew she had received — the $2,000 in trust for her client. Rather, the Committee stated explicitly at the onset its understanding that "clear and convincing evidence" was the applicable standard of proof. It then arrayed in detail (as did the Board in its report) the evidence of respondent's own contemporaneous conduct demonstrating, in the Committee's view, both that the entire $2,000 had been entrusted to respondent as client property and that she knew this to be the case. Respondent points to nothing in the Committee's analysis suggesting that it applied a lesser (i.e., preponderance) standard of

proof in finding incredible her defense that she had received the money in payment of attorney's fees.

Finally, this court bears ultimate responsibility for the imposition of discipline, and we may make our own determination of whether clear and convincing evidence supports the Hearing Committee's finding — at least where our conclusion on the point contradicts nothing in the Committee's (or the Board's) analysis.[1] The

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[1] As the Board pointed out, the Hearing Committee's finding that the respondent held the $2,000 in trust did not rest on an evaluation of the witness demeanor of either respondent or her client Green, but rather "only on [r]espondent's trust account records" which contained abundant evidence of her knowledge of the true nature of the funds. When a Hearing Committee's "credibility assessment gives no indication that it was based on [a] respondent's demeanor in testifying and responding to questions," the Board, and the court, are at greater liberty to reach their own conclusion

evidence arrayed in the Board's report leaves us with no doubt that Bar Counsel proved respondent's receipt of client funds by clear and convincing evidence. Moreover, the evidence supports — equally convincingly — the Board's conclusion that respondent was at least reckless in her misuse of the entrusted funds. *Cf. In re Berkowitz,* 801 A.2d 51 (D.C. 2002).

Accordingly, in No. 07- BG-608, we order respondent's disbarment from the practice of the law in the District of Columbia. In No. 06-BG-1480, we order her suspension from the practice of law for thirty days, to run concurrently with her disbarment.[2] Lastly, in No. 07-BG-608, we order

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as to whether evidence meets the clear and convincing evidence standard. *Anderson,* 778 A.2d at 341-42.

[2] Bar Counsel excepts from the Board's refusal

as a condition of reinstatement that respondent pay restitution to her client of $1,000 with interest at the legal rate of 6% from June 7, 1995.

So ordered.

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to recommend a showing of fitness as a condition of reinstatement in No. 06-BG-1480, but concedes that this issue is moot if we order disbarment in the Green matter. Bar Counsel also contests the Board's refusal to find in No. 06-BG-1480, that respondent had violated Rule 1.15 (a) (safekeeping property) of the Rules of Professional Conduct by failing to properly safeguard her client's original Will. Although the issues is a close one, and the distinction subtle, we accept the Board's reasoning that respondent had properly filed and stored the document after preparing it, and thus safeguarded it, but had later violated Rules 1.1 (b) and 8.4 (d) by failing either to locate the Will in timely fashion or to proceed with probate by causing a copy to be filed and declared the operable Will. We accept the Board's recommendation in light of the "strong presumption in favor of its imposition," and our belief that doing so would not "foster a tendency towards inconsistent dispositions." *In re Bingham*, 881 A.2d 619, 623 (D.C. 2005).

APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of:

LUCY R. EDWARDS, Bar Docket No. 387-96

Respondent.

REPORT AND RECOMMENDATION OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

The Office of Bar Counsel charged Lucy R. Edwards (Respondent) with eight separate violations of the disciplinary rules, growing out of her representation of Mr. Mark Green in an effort

over two years to stave off foreclosure on his condominium. Hearing Committee One (the "Committee") concluded that Respondent violated a number of Rules, including misappropriation, and recommends disbarment. The Board on Professional Responsibility (the "Board") agrees.

I. PROCEDURAL BACKGROUND

Bar Counsel initially filed a petition instituting formal disciplinary proceedings and a specification of charges on March 12, 1997. On May 19,1997, Bar Counsel filed a Motion to Dismiss Without Prejudice, which the Board granted on May 277, 1997. Bar Counsel submitted the petition and specification of charges now before the Board on October 21,2005. Respondent filed an

Answer on May 11, 2006, admitting many of the facts asserted by Bar Counsel but denying all of the charges.

The evidentiary hearing was held on May 23, 2006. Respondent was present and represented by counsel. Assistant Bar Counsel called two witnesses: Respondent and her client, Mark R. Green. Bar Counsel moved to introduce Bar Exhibits ("BX") 1 through 18, 25, 26 1nd 30, which were admitted without objection. Tr. at 304,312.[1] During Respondent's case, Respondent's Exhibits ("RX") A, B, C and D were introduced and admitted without objection. Tr.

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[1]"Tr. is used to designate the transcript of the May 23, 2006 hearing before the Committee.

295-97, 307-08. No additional witnessed were presented by Respondent. At the end of the hearing, the Committee made a preliminary, non binding determination that Bar Counsel had sustained its burden, under the clear and convincing evidence standard, that Respondent had committed some of the charged violations and the Committee requested briefing from the parties on all of the charges. Tr. At 306. Bar Counsel then submitted exhibits in aggravation and Respondent testified on her behalf during the mitigation phase of the hearing. Tr. At 315-33.

Bar Counsel submitted to the Committee proposed findings of fact, conclusions of law, and recommendations as to sanction ("BC Brief") on

June 26,2006, and Respondent submitted proposed findings of fact and conclusions of law ("R Brief") on July 17, 2006. Bar Counsel submitted a reply brief on August 2, 2006. The Committee issued its Report December 26, 2006.

II. PROPOSED FINDINGS OF FACT

With minor alterations that do not change the significance of the findings of fact, the Board adopts the well-written findings of the Committee.

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by examination on February 18, 1965, and assigned Bar number 1197020. BX A; Tr. At 69-70. In 1994, she moved her practice to 1424 K Street, NW, in the District of Columbia. Tr. at 74.

Retention of Respondent by Mark Green

2. On March 7, 1994, Mark R. Green, then a resident of the District of Columbia, met Respondent and retained her to assist him in filing for bankruptcy to protect his condominium, located at 1736 Willard Street, N.W., from foreclosure after he fell behind in making mortgage and condominium fee payments. BX 2 at 5; Tr. at 75, 186-90, 233. Mr. Green agreed to pay a flat fee for Respondent to prepare the bankruptcy filing, attend a meeting with his creditors, and secure an order from the Bankruptcy Court confirming Mr. Green's payment plan. BX 2 at 5. He also agreed to pay a $160 filing fee. Tr. At 96; BX 2 at 5. Mr. Green paid $700 of his fee that day. BX 9 at 33;

Tr. at 96, 102. The retainer agreement also indicated that Mr. Green would pay Respondent $150 per hour for any further work required in his case. BX 2 at 5.[2]

3. On March 9, 1994, Respondent filed a voluntary

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[2] The retainer form Respondent used was not one she normally used with a bankruptcy client, but the time-sensitive situation required a form that could be completed quickly. Tr. At 75. Mr. Green testified at the hearing that the "first order of business was to save the condo, and so we never discussed any fees other than the original retainer" and that he had never "really read [the] lines" on the retainer agreement specifying that Respondent's $1,000 fee covered only the initial bankruptcy filing, creditor's meeting, and confirmation. Tr at 196-97, 255. Mr. Green testified that he knew he was obligated to pay for Respondent's additional work and that the retainer agreement clearly specified a $150-per-hour rate for that additional work. BX 9 at 31; Tr. At 199, 256.

bankruptcy petition on behalf of Mr. Green, with an attached list of creditors and statement of attorney compensation, in the United States Bankruptcy Court for the District of Columbia (the "Bankruptcy Court"). BX 17 at 133; BX 18 at 136-38.

4. Mr. Green had three creditors: G.E. Capital Mortgage Services, Inc. "G.E. Capital"), which held the first trust on Mr. Green's condominium amounting to about $45,000, a second trust holder to which Mr. Green owed about $8,000 and his condominium association, which held a secured debt of about $7,500. BX 9 at 28.

5. On March 21, 1994, Respondent sent Mr. Green an invoice indicating that he was required to pay

the remaining $460 of his initial retainer and filing fee. BX 2 at 4.

6. On April 6, 1994, Respondent filed Mr. Green's various scheduled, a statement of financial affairs, and Chapter 13 plan. BX17 at 133.

7. On April 9, 1994, Mr. Green paid Respondent the remaining $460 of his initial retainer and filing fee. BX 9 at 33; Tr. At 96, 102.

8. On June 3, 1994, the Bankruptcy Court entered an order confirming Mr. Green's Chapter 13 plan. BX 18 at 139. Respondent thus achieved Mr. Green's objective of preventing foreclosure on his condominium.

Respondent's Post-Bankruptcy Confirmation Representation of Mr. Green

9. On August 18, 1994, G. E. Capital filed a motion for relief from the automatic bankruptcy stay because it had not received payments from Mr. Green pursuant to the bankruptcy plan. BX 17 at 134; BX 18 at 162. Subsequently, Respondent consulted with Mr. Green, reviewed records, and successfully negotiated a consent decree that gave Mr. Green an opportunity to catch up on his post-petition arrears (delinquent payments that had accumulated since the bankruptcy filing). BX 9 at 29.

10. On September 14, 1994, the Bankruptcy Court entered a consent order denying G.E. Capital's motion for relief from the stay after the parties had reached their agreement. BX 17 at 134; BX 18 at

162-63. The order provided that Mr. Green would cure the arrears by paying $1,180 to G.E. Capital that day and by making extra payments until December 1, 1994. *Id.* Mr. Green provided Respondent with a $1,180 cashier's check, which Respondent forwarded to G.E. Capital's attorney on September 14, 1994. BX 18at 160-61. That same day, Respondent sent a letter to Mr. Green informing him that she had forwarded his check and reminding him about his new payment responsibilities. *Id.* At 160.

11. On January 19, 1995, G. E. Capital filed an affidavit of breach notifying the Bankruptcy Court that Mr. Green had failed to make payments required by the consent order's new payment

schedule and that Mr. Green needed to pay $4,860.68 to cure the breach. BX 17 at 134; BX 18 at 165-68. G.E. Capital sent copies of the affidavit to both Mr. Green and Respondent. BX 18 at 167, 168.

12. On March 17, 1995, the Bankruptcy Court entered an order granting "G.E. Capital relief from the bankruptcy stay because Mr. Green had failed to cure the breach. G.E. Capital was thus allowed to foreclose on Mr. Green's condominium. BX 18 at 170-72, 175-77.

13. On March 21, 1995, Respondent spoke with Mr. Green about a proposed forbearance agreement she might be able to negotiate with G.E. Capital to keep it from taking action against Mr. Green's

property. Tr.114-17. Mr. Green testified that he told her he thought he could come up with at least $5,000 as part of that effort. Tr.114-17. Respondent provided similar testimony, though she recalled that the amount was between $3,000 and $5,000 and that this amount would include some payment of attorney's fees. Tr. at 140-41.

14. On April 10, 1995, Respondent faxed the attorney representing G.E. Capital a proposed forbearance agreement dated March 29, 1995, under which Mr. Green would pay $3,000 immediately and then make additional payments until he cured his outstanding arrears by, at the latest, the end of February 1996. BX 18 at 181-82; BX 9 at 29. G.E. Capital's attorney did not act on

the proposal. BX 9 at 29.

15. During the spring and summer of 1995, Respondent and Mr. Green discussed the possibility of reducing his bankruptcy payments from $330 per month, as the bankruptcy plan required, to $100. BX 9 at 30. The bankruptcy plan, however, was never modified. *Id.*

May 17, 1995 Check from Mr. Green to Respondent

A critical fact in this case involves the characterization of a $2,000 check drafted by Mr. Green payable to Respondent, dated May 17, 1995. BX 12 at 40.

16. On May 16, 1995, Respondent spoke with Mr. Green by telephone about his need to produce some

money to satisfy Mr. Green's outstanding debts. Mr. Green indicated that he would bring in $2,000 the next day and $5,000 altogether. BX 9 at 34.

17. On May 17, 1995, Mr. Green brought a cashier's check in the amount of $2,000 to Respondent's office. BX 12 at 39; Tr. at 193-95. Respondent was at her office when Mr. Green arrived with the check. Tr. at 192-95. It is not clear whether Mr. Green gave the check directly to Respondent or to one of Respondent's staff members, but Respondent was at least in the office when Mr. Green brought the check in and, in any event, became aware that Mr. Green had brought the money into the office. BX 9 at 31-32; Tr. at 195.

18. According to Mr. Green, he brought the $2,000 in for Respondent to hold on his behalf and use to try to forestall the foreclosure procedures on his condominium or to settle the arrears on his mortgage payments. Tr. At 195, 274-76; BX9 at 31. Mr. Green testified that he, Respondent, and Respondent's then office manager, Walter Johnson, agreed that the money would go into an escrow account. Tr. At 195. Mr. Green does not recall receiving any receipt showing that Respondent had received the check and what she was going to do with it. *Id.*

19. Respondent's testimony on this event differs in one critical respect. Respondent testified that this money was to be used in part to address Mr.

Green's outstanding debts with his three creditors, but also would be used to pay some of his outstanding attorney's fees. Tr. At 140-41. Although Respondent had a legitimate basis to seek additional attorney's fees from her client, her actions were inconsistent with the notion that any part of the $2,000 was for payment of an attorney's fee.

20. On May 19, 1995, Respondent deposited Mr. Green's $2,000 check into her attorney trust account. On that day, Respondent also deposited two checks, one for $4,000 and the other for $400, provided by her client Capitol Bus Rental, Inc. ("Capitol Bus") into the trust account. BX 14 at 57-59. Respondent indicated on the $4,000 Capitol Bus check's memo line that the money would be

used to make an Internal Revenue Service ("IRS") payment on the company's behalf. BX 14 at 59. Simultaneously, Respondent withdrew $1,400 in cash from the $6,400 deposit, leaving a net deposit of $5,000, which brought her trust account balance to $5,336.77. BX 14 at 55,57. Respondent did not note on the deposit ticket the reason for the $1,400 withdrawal or whose money it represented, but she testified that she took it out of Mr. Green's check as attorney's fees. BX 14 at 57; Tr. At 125.

21. On May 20, 1995, Respondent wrote a check drawn on her attorney trust account for $5,016.77 payable to the IRS on which she wrote "Tax payment for Capitol Bus Rental." BX 14 AT 69. Respondent does not have any records to explain how she was able to send a check for this amount

to the IRS on behalf of Capitol Bus when she had received only $4,000 for this purpose the day before. Tr. At 128-32. Respondent testified that a company representative provided sufficient additional money at some point, but none of the deposits immediately before she wrote the $5,016.77 check or any up to a month after the IRS cashed it show that any additional money on behalf of Capitol Bus entered her escrow account. Tr. At 128-38.

22. On May, 1995, Respondent deposited a $2,100 insurance settlement check made payable to another client into her escrow account, as well as a $4,000 check payable to herself and drawn against her operating account at Industrial Bank of Washington. BX 14 at 61. On the $4,000 check,

Respondent wrote "Bal. Atty's Fee," but she did not indicate whose fees that sum represented. *Id.* Tr. at 148. Simultaneously, Respondent withdrew $1,000 from the $6,100 total deposit, leaving a net deposit of $5,100, which brought her escrow account balance to $10,435.77 BX 14 at 55, 61. Respondent did not note on the deposit ticket the reason for the $1,000 withdrawal or whose money it represented. *Id* at 61.

23. Respondent wrote several checks against her escrow account that, by June 7, 1995, left a balance of $1,489.30. *Id* at 55. Additional disbursements left the escrow account with overdraft balances of

-$11.30 on June 19, 1995, and

-$36.30 on June 20, 1995. BX 15 at 81. On June 21, 1995, respondent deposited $50 into her

account, bringing the balance to $13.70. *Id* at 81, 87. On June 26, 1995, the balance rose to $913.70, then dropped to $712.68 by July 10, 1995. *Id.* at 81, BX 16 at 109. Thus, from June 7, 1995, until July 19, 1995, Respondent's escrow account balance remained under $2,000—less than the amount Mr. Green had brought to her office on May 17, 1995.

24. Mr. Green subsequently requested $1,000 back from the $2,000 he had brought to Respondent's office, to cover some pressing expenses including the cost of recovering his car from an impound lot and of moving to New York City for graduate school. Tr. at 212. He spoke with Mr. Johnson about obtaining the $1, 000. Tr. at 213.

25. On July 19, 1995, Respondent's escrow balance stood at $712.68. BX at 109. That day she

deposited $1,000 into the escrow account and then gave Mr. Green a check made out to him for $1,000 that included the notation, "Return of funds from escrow." BX 16 at 113, 125; Tr. At 150-51. The record thus indicates that Respondent took steps to ensure that she could pay Mr. Green from the funds in the trust account. Mr. Green picked the check up at the office and cashed it that day, leaving the escrow account balance at $712.68—less than the remaining $1,000 to be held on Mr. Green's behalf. BX 16 at 109; Tr. At 152-53, 270. The balance rose to $1,397.68 on July 24, 1995, but dropped to $397.61 on July 27, 1995, and remained below $1,000 until at least August 7, 1995. BX 16 at 109. Respondent does not have any invoices or documents indicating that she hade

returned the $1,000 to Mr. Green. Tr. At 159. Mr. Green never requested a refund of any further funds. Tr. At 262, 269.

26. In July, 1995, Mr. Green moved from Washington, D.C., to an apartment in the SoHo neighborhood of New York City. Tr. at 222. After moving, Mr. Green had a management company oversee his Willard Street condominium. Tr. At 278-79. A tenant who began living there in July or August paid about $600 or $700 in rent each month directly to the management company, but Mr. Green does not remember what the company did with that rent money. *Id.* At some point, Mr. Green moved to Union, New Jersey, but he does not recall for sure if that was in 1996 or 1997. Tr. At 222-24. He also does not remember if he told

Respondent about his move, but recalls that Respondent could and did contact him by calling the number to his parents' house in Scotch Plains, New Jersey. *Id.* at 224, 226. The most reliable contact information for Mr. Green after leaving Washington, D.C., was his parents' Scotch Plains address and phone number. *Id.* at 264. At least up until he left Washington, D.C., Mr. Green was satisfied with the communications he had with Respondent. *Id.* at 266.

27. On August 17, 1995, an attorney representing Mr. Green's condominium association wrote to Respondent, informing her that Mr. Green had not paid his monthly assessment that year and owed $1,584. RX B; BS 18 at 184. The attorney wrote that if the association did not receive payment by

September 1, 1995, it would request relief from the Bankruptcy Court. BX 18 at 184.

28. In October 1995, Mr. Green provided various financial data to G.E. Capital as part of a "workout package"that Respondent had attempted to negotiate, in lieu of foreclosure on Mr. Green's condominium, during the summer of 1995. BX 9 at 30.

29. On October 4, 1995, the Chapter 13 bankruptcy trustee filed a report with the Bankruptcy on claims pending Mr. Green. BX 17 at 134.

30. On October 6, 1995, Mr. Green wrote to Mr. Johnson in Respondent's office, opining that the $330 bankruptcy deductions from his payroll were excessive and that he should negotiate a reduction

to the $100 per month that he and Respondent had discussed previously. RX D; Tr. At 242-43.

31. In January 1996, Respondent and Mr. Green spoke briefly by telephone after Respondent left a message with his roommate at his New York City apartment. Tr. at 218; BX 9 at 30.

32. On February 12, 1996, the Chapter 13 bankruptcy trustee filed a report with the Bankruptcy Court on claims pending against Mr. Green. BX 17 at 134.

33. In the spring of 1996, Respondent learned that Mr. Green's condominium had gone into foreclosure, and she subsequently contacted his creditors to see if anything could be done. BX 9 at 31. Respondent's office did not receive any notice of the foreclosure from Mr. Green's creditors. *Id.*

34. On June 17, 1996, Mr. Green wrote Respondent at 1424 K Street, NW, office to inquire about the status of his condominium because he had received notice that it had gone into foreclosure, and he asked Respondent why she had not notified him, given that she had "$3,900 of my money in trust."BX 2 at 3.[3] He also asked about his bankruptcy status. *Id.*

35. In August 1996, Respondent moved her offices from 1424 K Street NW, to 3103 Georgia Avenue,

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[3] At the hearing, Mr. Green testified that he had provided Respondent, in addition to the $2,000 cashier's check on May 7, 1995, two additional checks. Tr. at 202. However, during Bar Counsel's investigation, Mr. Green indicated that he had given Respondent only one other check. BX 12 at 39. There is no other evidence supporting this testimony and the Committee found that Mr. Green provided only $2,000 to Respondent. Tr. at 203.

NW, and during the move she lost Mr. Green's June 17, 1996 letter to her. BX 2 at 3; BX 9 AT 27. Respondent never answered the letter. Tr. at 204-05.

36. On August 30, 1996, Mr. Green wrote to Bar Counsel to complain that Respondent had not responded to a letter he had sent in July, 2006. BX at 1. He explained that he learned from a management company that his condominium had gone into foreclosure and that the money he provided to Respondent "in trust" was meant for her to monitor and advise on his matter. *Id.*

37. On October 2, 1996, Bar Counsel sent Respondent a letter addressed to her Georgia Avenue office notifying her of Mr. Green's complaint and informing her that Bar counsel had

decided to investigate it. BX 3 at 7-8; Tr. at 79-80. Bar Counsel attached Mr. Green's complaint and requested a response by October 14, 1996. BX 3 at 7-8.

38. On October 10, 1996, the Chapter 13 trustee filed a motion to dismiss Mr. Green's bankruptcy case because he was in material default of his plan payments and because he failed to notify the trustee of the name and address of his then employer. BX 18 at 188-89. Copies were sent to Mr. Green and Respondent. *Id.* at 189. Respondent did not oppose the trustee's motion. *Id.* at 186.

39. On October 21, 1996, Bar Counsel sent Respondent another letter of inquiry because Respondent had not responded to the October 2, 1996 letter. BX 4 at 9; Tr. At 80. Bar Counsel

demanded a written response to Mr. Green's allegations by October 26, 1996. BX 4 at 9.

40. On November 1, 1996, Respondent left Bar Counsel a recorded message concerning her need to respond to its letters of inquiry. BX 5 at 11.

41. On November 4, 1996, based on the trustee's motion to dismiss, the Bankruptcy Court ordered that Mr. Green's bankruptcy case be dismissed with prejudice. Respondent was sent a copy of his order. BX 18 at 186.

42. On November 5, 1996, Respondent advised a law clerk for the Office of Bar counsel that she would respond to Bar Counsel's letter and Mr. Green's allegations. BX 5 at 11.

43. On November 12, 1996, Respondent met with an Assistant Bar Counsel, who told her that he

would move to compel a written response if she did not submit one soon. *Id.*

44. On December 5, 1996, the Bankruptcy Court issued another order to close the case, which Respondent received. Tr. at 163. At this point, Respondent considered her representation of Mr. Green to have ended. *Id.*

45. On December 18, 1996, a law clerk with the Office of Bar Counsel spoke with Respondent by telephone; Respondent said she had been ill and would seek additional time to file a response. BX 5 at 11.

46. On December 20, 1996, Respondent faxed a letter to an Assistant Bar Counsel seeking an extension because she had been dealing with various health problems, including migraine

headaches, glaucoma, a sinus infection, and the flu, and because she was struggling to meet client obligations after moving offices and becoming a solo practitioner. *Id.*; BX 6(B) at 83. Respondent informed Assistant Bar Counsel that she would contact him before Christmas to reschedule the Green case and two other also pending with Bar counsel. BX 6(b) at 23.

47. On December 24, 1996, Respondent appeared at the Office of Bar Counsel seeking to meet with Assistant Bar Counsel, who was unavailable. BX 5 at 12. Respondent left without providing her written response. *Id.*

48. On January 3 and 6, 1997, a law clerk for the Office of Bar Counsel phoned Respondent concerning her lack of written response and told

her that Bar Counsel would move the Board to issue an order compelling her to provide one if she did not do so by January 9, 1997. *Id.* Respondent promised to do so, but she did not.

49. On January 22, 1997, Bar Counsel filed a motion to compel Respondent's written response and mailed a copy of the motion to Respondent. BX 6(a) at 13-14.

50. On February 12, 1997, the Board ordered Respondent to respond to Bar Counsel's letters and Mr. Green's allegations within ten days. *Id.* at 14.

51. On February 14, 1997, a copy of the Board's order was hand-delivered to Respondent. *Id.* at 14.

52. On March 12, 1997, Bar Counsel obtained approval of a petition and specification of charges alleging that Respondent violated Rule 8.4(d) and

D. C. Bar R. XI, § 2(b)(3) based on Respondent's failure to comply with the Board's order. *Id.* at 13-15.

53. On April 11, 1997, Respondent's attorney wrote to the Hearing Committee assigned to the case to request additional time to review evidence and prepare an answer to the charges and to request that the hearing set for April 29, 1997, be postponed for thirty days. BX 8 at 25-26.

54. On April 30, 1997, Respondent finally responded to Bar Counsel's letters of inquiry and to Mr. Green's allegations. BX 9 at 27-32, Tr. At 87-88. Respondent summarized the work she had done on behalf of Mr. Green and included a "Statement" dated May 7, 1997, detailing work she had done for him between March 1994 and April

1996. BX at 24-34.[4] Although Respondent believes she did much more work than was reflected on th May 7, 1997 Statement, which she and her husband prepared, she has not been able to locate any invoices she may have sent to Mr. Green asking for payment for this additional work. Tr. at 96-99. Mr. Green testified that he received no statements since the one of March 21, 1994, requesting payment of the remaining $460 of his initial retainer fee. Tr. At 207-08; *see also* Tr. at 284. The May 7, 1997 Statement has no entry reflecting the $1,000 Respondent refunded to Mr.

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[4] Although the Respondent's letter to Bar Counsel was dated April 30, 1997, the Statement was dated May 7, 1997. BX 9 at 27-34. Respondent admitted in her April 30, 1997 letter that Mr. Green had not received the May 7, 1997 Statement. *Id.* at 27.

Green on July 19, 1995. BX 9 at 34; Tr. at 158-59.

55. The April 30, 1997 letter represented Respondent's best memory of her representation for Mr. Green at that time. Respondent contends, however, that the letter was not a perfectly accurate summary because Respondent's office manager was not available to help prepare it. Tr. at 88.

56. On May 12, 1997, through her attorney, Respondent provided an answer to the specification of charges. BX 6(B) at 20-23. Respondent explained that, during her August 1996 move, she did not receive Bar Counsel's inquiry letters promptly because she did not immediately notify the D. C. Bar of her new office address. *Id* at 20-21. After her move, she operated without staff

support and had difficulty retrieving records and files according to her Answer, and Mr. Green's file and her bank records could not be found for some time. *Id.* at 21. She also stated in her Answer that she had been dealing with health issues. *Id.* at 21-22.

57. On May 19, 1997, Bar Counsel filed a motion to dismiss the petition and specification of charges without prejudice, having received responses from Respondent that would permit an investigation. BX 7 at 24.

58. On May 27, 1997, the Board issued an order granting Bar Counsel's Motion to Dismiss without prejudice. *Id.*

III. CONCLUSIONS OF LAW

Based on these facts, Bar Counsel charged

Respondent with eight violations. One set of charges related to Respondent's actions during her representation of Mr. Green, and the other related to her actions after Bar Counsel informed her that it was opening an investigation. As did the Committee, we address each of these violations in turn. We also adopt large portions of the well-reasoned conclusions of the Committee.

A. Count I Charges: Respondent's Representation of Mr. Green

These charges allege that Respondent:

(1) Misappropriated a portion of the $2,000 that Mr. Green gave Respondent in violation Rule 1.15(a);

(2) Failed to deliver the rest of those funds to him and render a full accounting upon his request

in violation of Rule 1.15(b);

(3) Failed to take timely steps to surrender the remainder of those funds to him after her representation of him ended in violation of Rule 1.16(d);

(4) Failed to keep Mr. Green reasonably informed about the status of his bankruptcy matter in violation of Rule 1.4(a).

The first three charges relate to Respondent's alleged mismanagement of her client's funds. Before examining those charges, the Committee first addressed a threshold question: whether the $2,000 Mr. Green gave Respondent belonged to him or to Respondent. We do the same and conclude, as did the Committee, that the $2,000 (and then the remaining $1,000) were client funds—to be held in

escrow for his purposes.

At the hearing, Respondent testified that Mr. Green brought the $2,000 check to her on May 17, 1995, at least in part to cover past and future attorney's fees. Tr at 140-42. There is substantial record evidence; however, that Respondent believed the entire $2,000 was Mr. Green's funds, to be held on his behalf as part of negotiations with his creditors. In Respondent's 1997 letter to Bar Counsel, which represented the first substantive response to Mr. Green's allegations in this matter and Respondent's best recollection of her representation of him at the time, she wrote:

> Mr. Green brought funds into the office in May 1995 to attempt to settle or secure a forbearance for the arrears on his mortgage. . .In July 1995, Mr. Green requested and received back $1,000 of the money. After considering the amounts owed for services

> and review of his case, Mr. Green is entitled to a refund. BX at 31-32.

During her testimony (nine years later), Respondent claimed that her memory was hazy when writing the earlier response and that, having recently managed to speak with Mr. Johnson about Mr. Green's representation, she was reminded that Mr. Green had urgently requested that she continue representing him and that he paid attorney's fees in May 1995. Tr. at 168-71. She also was reminded that Mr. Green would usually indicate the specific purpose for which he intended his money to be used, and because Mr. Green would usually indicate the specific purpose for which he intended his money to be used, and, because Mr. Green's $2,000 cashier's check did not reflect any such purpose, she concluded (eleven years after the event) that the

money was meant to cover attorney's fees. Tr. at 172-73. The Committee did not find Respondent's 2006 testimony on this threshold issue to be credible. Having reviewed the evidentiary record, the Board is in agreement.

As stated by the Committee, even if it were inclined to give more weight to Respondent's 2006 memory versus her 1997 written response, there is additional independent evidence that Respondent viewed the $2,000 as Mr. Green's money. First, Respondent deposited Mr. Green's check into her escrow account, not her operating account. BX 14 at 57-59.[5] Respondent did not provide Mr. Green any type of receipt crediting him for paying

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[5] Respondent testified that depositing Mr. Green's funds into her escrow account was a mistake. Tr. at 154.

attorney's fees and her May 7, 1997 statement summarizing the services she provided Mr. Green did not indicate any payment of attorney's fees beyond the initial $1,160. Tr. at 156-58; BX 9 at 33-34. Moreover, prior to his delivering the money, Respondent had not sent Mr. Green any invoices requesting payment for services beyond the one in 1994 requiring payment of the remainder of his initial $1,000 retainer fee.[6]

Just two months after Mr. Green delivered the money, Respondent promptly returned $1,000 to Mr. Green at his request, writing a check drawn on her escrow account and marking the check as "Return of funds from escrow." BX 16 at 125. If

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[6] This is in addition to the $160 filing fee he had also agreed to pay up front, for a total initial payment of $1,160. Tr. at 96.

Respondent believed she was lending him her own money, she could have simply given cash or a personal check. Tr. at 155-56. That Respondent also deposited $1,000 of personal funds into her escrow account that day to cover the $1,000 check from her escrow account was also telling to the Committee and the Board. BX 15 at 109, 113. The Committee concluded from this evidence that Respondent knew that these funds (the entire $2,000) were Mr. Green's property and not payment of attorney's fees. Hearing Committee Report ("HC Rpt") at 18. Finally, Respondent's April 1997 Response to Bar Counsel specifically defined these funds received from her client in May 1995 as non-fee escrow funds. BX 9 at 31-32.

Mr. Green testified that he brought the

money in to be held on his behalf and used as a part of negotiations with his creditors, and he said that Respondent and Mr. Johnson had discussed this plan and were in agreement on it. Tr. at 195. 274-76. Mr. Green, however, was not a credible witness before the Committee, and it based its findings and conclusions on the record of deposits and disbursements from Respondent's trust account and not on Mr. Green's testimony. HC Rpt. at 18-19. A substantial basis for the Committee's lack of faith in Mr. Green's testimony was that he could not keep his payment commitments under agreements negotiated by Respondent and, mot importantly, overstated the funds that he had provided to Respondent in his Bar Counsel complaint. Therefore, all findings of the Committee that do not

adopt Respondent's testimony were based only on Respondent's trust account records. *Id.* Having reviewed the record, the Board agrees with this assessment of the evidence.

Having decided that the $2,000 belonged to Mr. Green, requiring it to be held in trust by Respondent, the Committee then analyzed each individual charge in this Count, finding that Bar Counsel proved by clear and convincing evidence that Respondent violated Rules 1.15(a), 1.15(b), 1.16d) and D.C. Bar R. XI § 19(f) but not that she violated Rule 1.4(a). The Board agrees with these conclusions, and with modification, adopts much of the Committee's well-reasoned legal analysis.

1. Rule 1.15(a): Misappropriation of Client Funds

Rule 1.15(a) states, in relevant part, that " a

lawyer shall hold property of clients. . . that is in the lawyer's possession in connection with a representation separate from the lawyer's own property" and that such funds "shall be kept in a separate account maintained in a financial institution." Our court has repeatedly held that misappropriation includes any unauthorized use of a client's funds entrusted to his or her lawyer, including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he or she derives any personal gain or benefit. *See, e.g., In re Carlson,* 808 A.2d 341, 347-48 (D.C. 2002); *In re Anderson,* 778 A.2d 330, 335 (D.C. 2001)(citing *In re Harrison,* 461 A.2d 1034, 1035 (D.C. 1983); *In re Berryman,* 764 A.2d 760, 768 (D.C. 2000); *In re Travers,* 764 A.2d 242,

249-50 (D.C. 2000); *In re Pels*, 653 A.2d 388, 393-94 (D.C. 1995). In addition, misappropriation occurs whenever the balance in the attorney's escrow account falls below the amount due to the client, regardless of whether the attorney acted with an improper intent. It is essentially a *per se* offense. *See In re Smith*, 817 A.2d 196, 202 (D.C. 2003); *Carlson*, 802 A.2d at 348; *Anderson*, 778 A.2d at 335; *Berryman*, 764 A.2d at 768.

The record of Respondent's escrow account balances during June and July 1995 indicates that she misappropriated Mr. Green's money. After depositing his $2,000 cashier's check into her attorney trust account on May 19, Respondent made a number of other deposits and simultaneous cash withdrawals that left her escrow account balance at

$10, 436.77 on May 24. BX 14 at 55. She then wrote a series of checks that left the account balance at $1,489.30 on June 7, at -#11.30 on June 19, at -$36.30 on June 20, at $13.70 on Jun2 20, at $13.70 on June 21, at $913.70 on June 26, and then never higher than $913.70 by the time Mr. Green arrived at Respondent's office to get $1,000 back on July 19. BX 14 at 55; BX 15 at 81; BX 16 at 109. Thus, from June 7 until July 19. BX 14 at 55; BX 15 at 81; BX 16 at 109. Thus, from June 7 until July 19, Respondent's escrow account balance remained below the $2,000 Mr. Green had given her to hold in trust. Additionally, after Respondent returned $1,000 of his money she was required to hold in trust, rose above $1,000 for three days in late July, and then dropped below $1,000 from July

27 until at least August 7 (the last balance date included in the record). BX 16 at 109. By allowing her escrow account balance to drop below the amounts she owed him, there is no question that Respondent misappropriated Mr. Green's money.

As noted in the Committee's Report, the important question for sanctions is whether Respondent's misappropriation resulted from mere negligence on her part, or whether she acted intentionally or recklessly, for "in virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than simple negligence." *See Anderson,* 778 A.2d at 335 (quoting *In re Addams,* 579 a.2d 190, 191 (D.C. 1990)(en banc)); *see also Pels,* 653 A.2d at 396; *In re*

Micheel, 610 A.2d 231, 233 (D.C. 1992); *In re Midlen*, 885 A.2d 1280, 1288 (D.C. 2005)(noting that disbarment is "almost invariably" required if the attorney acts intentionally or recklessly in misappropriating client funds). In determining whether a misappropriation involves more than just negligence, the "central issue . . . is how the attorney handles entrusted funds, whether in a way that suggests the unauthorized use was inadvertent or the result of simple negligence, or in a way that reveals either an intent to treat the funds as the attorney's own or a conscious indifference to the consequences of his [or her] behavior for the security of the funds." *Carlson*, 802 A.2d at 348 (quoting *Anderson*, 778 A.2d at 339); *see also Midlen*, 885 A.2d at 1288.

Here, Respondent's bank records reveal not only that she allowed her escrow account balance to drop below what she owed Mr. Green, but also that she used his money for her own purposes. When she deposited his $2,000 and two checks totaling $4,400 from Capitol Bus on May 19, 1995, she withdrew $1,400 in cash without noting on the deposit slip which client's $1,400 was withdrawn or why. BX at 57. At the hearing, she claimed the $1,400 represented attorney's fees Mr. Green owed her; however, as discussed *supra*, that testimony is refuted by the record of her treatment of the $2,000 as Mr. Green's property. Tr. at 125.

The next day, Respondent wrote a $5,015.77 check to the IRS on behalf of Capitol Bus, even though she had received only $4,400 from that

client the day before. BX 14 at 69. Respondent claims that Capitol Bus provided her with additional money, but her bank records show no other deposits on behalf of that client around that time. Tr. at 128-38. Just before Respondent deposited the Capitol Bus checks, her escrow account balance stood at $336.77. BX 14 at 55. Thus, at least $280 of Mr. Green's money went toward covering the difference between what she received from Capitol Bus and what she paid out to the IRS on its behalf.

Finally, when Mr. Green asked for $1,000 back, she was forced to deposit $1,000 of the money she had kept for her own purposes into her account before she could write him a check from her escrow account for that amount. BX 16 at 113, 125; Tr. at

150-51. If Respondent believed that the $2,000 were, in fact, her funds, she would have drafted a $1,000 check from her personal or operating fund account. The Board also finds it telling, as did the Committee, that Respondent's check returning $1,000 to her client carried the notation "Return of funds from escrow." BX 16 at 125.

Based on this evidence, the Committee concluded that Respondent intentionally misappropriated Mr. Green's funds.[7] She not only

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[7] Even if it could be argued that Respondent did not intentionally misappropriate Mr. Green's money, she certainly acted recklessly – that is, with a conscious indifference for the security of that money. "Hallmarks" of reckless misappropriation include indiscriminate commingling of entrusted and personal funds; a total disregard of the status of accounts into which entrusted funds were placed, resulting in repeated overdrafts; and indiscriminate movement of monies between accounts. *Anderson,* 778 A.2d at 338;

diverted his money to cover a shortfall involving another client but also used almost three fourths of it in cash before unexpectedly being asked for half of it back two months later. The Board concurs in this conclusion. This case is not about "sloppy billing for far less than the value' of Respondent's legal services rendered her client, as posited in Respondent's brief. R Brief at 1,12. Even if she had billed Mr. Green for additional work - which she had not, she had absolutely no right to take money held for Mr. Green (his money) and convert it to payment of fees without his permission. Tr. At 96-

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Carlson, 802 A.2d at 348-49. By not detailing on the May 19, 1995 deposit slip why she withdrew $1,400 or from which source of funds she withdrew that money, and by allowing her escrow account balance to remain below the amount Mr. Green gave her, Respondent demonstrated a reckless disregard for the security for her client's funds

100.

> It also is understandable that Addams wanted to be paid for his work and reimbursed for his expenses. He was entitled to this and he had the right to look to Ms. Jackson [his client] and to insist on prompt payment. He also had the right to pursue legal remedies against her, such as filing a lien. But he did not have, and he knew he did not have, the right to take money from the escrow account without her permission.

Addams, 579 A.2d at 199.

Addams also involved the retention of an attorney (the respondent) to hold funds of his client in order to stave off foreclosure on her home. Even though the respondent in *Adams* made good on the bounced check caused by his withdrawal of escrow funds for personal reasons, and successfully protected his client in the loss of her house, "where client funds are involved, a more stringent rule is

appropriate." *Id.* at 198. "Whatever the need may be for the lawyer's handling of clients' money, the client permits it because he trusts the lawyer." *Id.* (Quoting in the Matter of *Wendell R. Wilson,* 81 N.J. 451, 453-55, 409 A.2d 1153, 1154 (N.J. 1979)). The breach of that trust "is so reprehensible, striking at the core of the attorney-client relationship, that the respondent must carry a very heavy burden in rebuttal." *Id.* at 198-99.

2. Rule 1.15(b): Failure to Deliver Funds or Render Accounting

Rule 1.15(b) requires a lawyer, after receiving funds or property "in which a client . . . has an interest," to "promptly deliver to the client . . . any funds or other property that the client . . . is entitled to receive and, upon request by the client . . . promptly render a full accounting

regarding such property." *See Pels,* 653 A.2d at 396 (finding a Rule 1.15(b) violation when an attorney kept $432 due a client out of his belief that the retainer agreement, providing that the client would pay administrative costs, entitled him to keep the money).

Mr. Green's June 17, 1996 letter to Respondent does not specifically request an accounting of the money he left for her in trust; therefore, Respondent did not violate this rule by failing to provide one. *See* BX 2 at 3. She did violate the rule, however, by not returning the remaining $1,000. Mr. Green gave her his moneyl thus, by definition, he had an interest in it and was entitled to its return under Rule 1.15(b). Respondent herself advised in 1997 (as opposed to

today) that Mr. Green was entitled to a refund. BX 9 at 31-32. By June 1996, the purpose for holding the funds – to be used as part of negotiations to convince G.E. Capital not to foreclose on Mr. Green's condominium – had been rendered moot. The condominium had gone into foreclosure earlier that year. It should have been clear to Respondent that she needed to return the remaining $1,000 to Mr. Green when she learned that the condominium had gone into foreclosure – and certainly by the time Mr. Green filed his complaint. Whatever justification Respondent may have had for not initially responding to Mr. Green's letter (see discussion infra Rule 1.4(a)), there is no excuse for not returning his money immediately. It is true that Respondent was entitled to be paid for her

services. Respondent had devoted substantial time to Mr. Green's interest beyond the initial bankruptcy filing, creditor's meeting, and confirmation. BX 2 at 5. However, Respondent did not "have the right to take money from the escrow account" without her client's permission. *Addams,* 579 A.2d at 199. The Board agrees with the Committee on Respondent's violation of Rule 1.15(b).

3. Rule 1.16(d): Failure to Surrender Property After End of Representation

Rule 1.16(d) requires a lawyer, in connection with the termination of a representation, to "take timely steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled, and refunding any advance

payment of fee that has not been earned." *In re Hallmark*, 831 A.2d 366, 372 (D.C. 2003) (finding Rule 1.16(d) violation where attorney did not refund $1,000 that client paid her as a flat fee to file a motion to dismiss that the attorney never filed, even though she may have performed services in excess of $1,000 on an hourly basis).

The question under Rule 1.16(d) is when Respondent's representation of Mr. Green ended Mr. Green testified that he thought the attorney-client relationship ended when his condominium went into foreclosure in early 1996. Tr. At 216. Respondent testified that she believed their relationship ended when his bankruptcy case was closed in late 1996. Tr. At 163. Bar Counsel agrees with Respondent. *See* Tr. At 177. Bar

Counsel points out that Respondent did not attempt, after Mr. Green's case closed in December 1996, to calculate what funds she was holding on Mr. Green's behalf or what he owed her for her work. BC Brief at 26; Tr. At 164. Nor did she send Mr. Green an invoice at that time. Tr. At 7-12. Respondent failed to refund any of the remaining $1,000 of Mr. Green's money after his case closed.

Although Respondent believes her representation ended when Mr. Green's case closed, she also testified that she believed she should not contact Mr. Green after Bar Counsel launched its investigation in October 1996. *See* Tr. at 91, 177. For Rule 1.16(d) purposes, Respondent's representation of Mr. Green "terminated" in October 1996 and she should have

taken steps to return his $41,000 at that point. If she believed she could not contact Mr. Green directly at that time, she could have made arrangements with Bar Counsel to refund the money. To conclude otherwise would mean that whenever Bar Counsel informs an attorney that he or she is subject to a current client's complaint, that client's property would be frozen while Bar Counsel investigates the complaint.[8] We agree that Respondent violated Rule 1.16(d).

4. Rule 1.15(a), D.C. Bar R. XI, § 19(f): Failure to

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[8] To the extent that Respondent may have believed the $1,000 belonged to her as attorney's fees or that there was legitimate question as to whose money it was, Respondent was still under an obligation to hold that money in trust while the dispute amounts and held in trust as required by Rule 1.15). Respondent has not argued that she did this, and nothing in the record suggests she took this step.

Keep Complete Records

Rule 1.15(a) requires lawyers to keep "complete records of . . . account funds and other property" and preserve them" for a period of five years after termination of the representation." D.C. Bar R. XI, § 19(f) also requires attorneys to "maintain complete records of the handling, maintenance, and disposition of all funds . . . from the time of five years after final distribution of such funds."

Shedding more light on the financial transactions in Mr. Green's case by stating that she "cannot locate the requested materials or any other relevant materials." BX 10 at 35. Respondent had no records to trace the whereabouts of the $2,000 she had received in trust from Mr. Green. *Id.* As

stated in the Committee Report, this is a textbook case of failing to maintain complete records and is a clear violation of Rule 1.15(a).

5.Rule 1.4(a): Failure to Keep Client Informed

Rule 1.4(a) requires a lawyer to keep a client "reasonably informed about the status of a matter and promptly comply with reasonable request for information." A client is entitled to "whatever information the client wishes about all aspects of the subject matter of the representation." Rule 1.4 (a) cmt.

2. Although Respondent's communications with Mr. Green during her representation of him may not have been perfect, the Committee concluded that Bar Counsel has not proved by clear and convincing evidence that they were unreasonable

under the circumstances. Bar Counsel has not chosen to appeal this proposed finding and conclusion.

Even if Respondent never discussed the foreclosure during any telephone conversations with Mr. Green around that time, the Committee does not think her actions were unreasonable, given the nature of this case and Mr. Green's behavior throughout the representation. Mr. Green's case was a simple bankruptcy matter, and beyond filing his case in the Bankruptcy Court, meeting with creditors, and getting a plan approved, there was not much further assistance or advice Respondent could provide. All that needed to happen was for Mr. Green to make his payments. Mr. Green acknowledged this during

his testimony. Tr. at 258-59. He repeatedly failed to life up to his end of the bargain.

Given his own repeated failures to make various payments, the Committee found it non-credible that Mr. Green was unaware that his condominium would have gone into foreclosure. Financial records are complete only when an attorney's documents are "sufficient to demonstrate [the attorney's] compliance with his ethical duties." *In re Clower*, 831 A. 2d 1030, 1034 (D.C. 2003) (finding Rule 1.15(a) and § 19 (f) violations). The purpose of the rule requiring complete records is so that "the documentary record itself tells the full story of how the attorney handled client or third-party funds" and whether, for example, the attorney misappropriated or

commingled a client's funds. *Id.*; see also *Pels*, 653 A.2d at 396 (finding Rule 1.15(a) violation when attorney showed a "pervasive failure" to maintain contemporaneous records accounting for the flow of client funds within various bank accounts). Our Court has instructed that a lawyer needs a "system" which permits him to treat funds held in trust, especially when handling funds of multiple clients, as here. *Anderson*, 778 A.2d at 338-40. The records themselves should allow for a complete audit even if the attorney or client is not available.

Here, the record demonstrates that Respondent failed to comply with Rule 1.15(a) and D.C. Bar R. XI, § 19(f) record keeping requirements. For example, Respondent deposited

a $4,000 check drawn on her operating account into her escrow account and labeled the check as attorney's fees - but failed to indicate which client's fees that money represented and why she was putting attorney's fees into her escrow account in the first place. BX 14 at 61; Tr. At 148. Also, as discussed, Respondent failed to indicate on a deposit slip whose money she was taking and why when she withdrew $1,400 from the gross deposit of $6,400 on May 19, 1995. BX 14 at 57. She claims that Capitol Bus gave her enough money to cover a $5,016.77 check she made out to the IRS on its behalf, but she was not able to provide any documents indicating that she received any more than $4.400 total from the company during that time period.

In September 1997, a year after she had moved offices and a little more than two years after receiving the $2,000 from Mr. Green, Respondent replied to a Bar Counsel request for records and that it in fact did go into foreclosure. It would also be unreasonable to expect Respondent to remain in constant contact with Mr. Green to push him to meet his payment obligations. Beyond the failures to make payments, Mr. Green displayed an overall level of irresponsibility with respect to his case and his property that further makes Respondent's level of communication with him reasonable under the circumstances. As found by the Committee, he seemed to expect Respondent to work a miracle with that $2,000 (and then, a few weeks later, only $1,000) – she was supposed to secure a forbearance

agreement with that amount as leverage against the tens of thousands of dollars the condominium was worth. Although living in New York City, he gave Respondent his parents' New Jersey address and phone number to use. Respondent did attempt to reach Mr. Green at least two different locations (his residence and his parents' home) in the New York/New Jersey area. Tr. at 264. Mr. Green also expected Respondent to negotiate a reduction in his bankruptcy payments to $100 a month. RX D; Tr. At 242-43. Working with a difficult client who did not appear to take his obligations seriously, it is understandable that Respondent would not have been able to sort through his case and provide a complete response when he asked about his foreclosure and the status of his case in June 1996.

B. Count II Charges: Respondent's Response to Bar Counsel's Investigation

These charges allege that Respondent:

(1) Seriously interfered with the administration of justice in violation of Rule 8.4(d);

(2) Knowingly failed to respond reasonably to a lawful demand for information from a disciplinary authority in violation of Rule 8.1(b); and

(3) Failed to comply with an order of the Board in violation of D.C. Bar R. XI, § 2(b)(3).

The Committee concluded that Bar Counsel failed to prove by clear and convincing evidence that Respondent violated Rule 8.4(d), but did prove that she violated Rule 8.1(b) and D.C. Bar R. XI, § 2(b(3). The Board concludes there was sufficient proof on all three of these counts.

1. Rule 8.4(d): Interference with the Administration of Justice

Rule 8.4(d) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct that seriously interferes with the administration of justice." To establish a Rule 8.4(d) violation, Bar Counsel must prove by clear and convincing evidence that (1) the attorney took improper action or failed to take required action; (2) the conduct involved bears directly on the judicial process in an identifiable case or tribunal; and (3) the conduct "taint[s] the judicial process in more than a *de minimis* way"– it must at least "potentially impact" the process "to a serious and adverse degree." In re Hopkins, 677 A.2d 55, 61 (D.C. 1996). *See also In re Owusu*, 886 A.2d 536, 540 (D.C. 2005); In re Hallmark, 831 A.2d at 374; In re

Travers, 764 A.2d 242, 248 (D.C. 2000).

Failures to respond to Bar Counsel's inquiries or subpoenas may constitute misconduct under Rule 8.4(d). Rule 8.4(d) cmt. 3; see, e.g., In re Karr, 722 A.2d 16, 22 (D.C. 1998) (finding a Rule 8.4(d) violation when attorney ignored multiple letters sent to him by Bar Counsel in connection with disciplinary matters and when he admitted the violation); in re Cater, 887 A.2d 1, 17 (D.C. 2005 (finding a Rule 8.4(d) violation when attorney failed to respond to repeated Bar Counsel letters and orders of the Board on Professional Responsibility). Bar Counsel argues that Respondent's failure to submit a written response to his October 1996 letters of inquiry and failure to respond timely to the Board's February 1997 order

amounts to a Rule 8.4(d) violation. BC Brief at 41-42.

The Committee concluded that Respondent's delay in 1996 and 1997 in submitting a written response did not amount to "seriously" interfering with the administration of justice. It found no indication that Respondent deliberately ignored Bar Counsel's letters or acted dishonestly, and pointed out that she, in fact, did reach out to Bar Counsel in an attempt to discuss her response. HC Rpt. at 31. She phoned Bar Counsel's office within one month of receiving its October 2 inquiry, and also met with Assistant Bar Counsel in November 1996 to discuss her situation. The following month, she again spoke with Bar Counsel and explained the reasons for her delay, citing

numerous health problems, her recent office move, and increased pressures after becoming a solo practitioner. BX 5 at 11; BX B at 31. In January, Bar Counsel phoned Respondent to advise her he would seek a Board order compelling her response, which was issued and received by Respondent in mid-February. When this failed to elicit a timely response to Bar Counsel's October 1996 letter inquiry, the Board approved a petition with specifications which was personally served on Respondent. On April 11, 1997, counsel for Respondent corresponded with the Board's office seeking additional time and on April 30, 1997, Respondent finally filed her written response to Bar Counsel's October 2, 1996 letter of investigation. BX at 25-26; BX 9 at 27-32. On May

12, 1997, Respondent, through her counsel, filed her Answers to the March 12 specification of charges. BX 6(b) at 20-22. Following receipt of Respondent's written response, Bar Counsel obtained a dismissal without prejudice of its March 12 specification of charges. BX 7 at 24.

Clearly, Respondent's tardiness in response to Bar Counsel's investigation delayed that process by some months. The first and second tests of *Hopkins* are met by clear and convincing evidence, i.e., (1) Respondent failed to take action when she was required to do so (respond to Bar Counsel and the Board) and (2) such conduct bore directly on the attorney disciplinary process concerning an identifiable matter. See *Hopkins*, 677 A.2d 55. As to whether there was clear and convincing evidence

of the third test in *Hopkins* – potentially impact the process "to a serious and adverse degree" – the Committee came down on the side of Respondent, relying heavily on *Owusu.* HC Rpt. At 31-32; see *Hopkins,* 677 A.2d at 61. In *Owusu,* respondent failed to respond to Bar Counsel's repeated mailings, but the evidentiary record showed he had never received any of Bar Counsel's or the Board's communications, as he had failed to maintain this current address with the Bar. Bar Counsel nevertheless successfully prosecuted respondent for other ethical violations, without Respondent's participation. The Court (and the Board) found that Rule 8.4(d) had not been convincingly proven in that there was no evidence respondent had purposefully evaded Bar Counsel's

communications, i.e., that his failures to update his Bar address"[were] at all related to" the investigation, i.e., were intended to impede. *Owusu,* 886 A.2d at 541. Further, the Court rejected Bar Counsel's argument that its investigation had been hampered since Bar Counsel "was able to successfully prosecute the disciplinary complaint . . ." id.

Here also, Bar Counsel was able to successfully complete its investigation and prosecute. However, unlike the facts in *Owusu,* Respondent herein was fully aware of Bar Counsel's investigation and simply was dilatory in responding to both Bar Counsel and the Board. Unlike *Owusu,* Respondent's acts here bore directly on, and were related directly to, the

disciplinary investigation. See, e.g., *In re Mabry*, 851 A.2d 1276 (D.C. 2004)(percuriam) (Rule 8.4(d) violation where attorney failed to respond to Bar Counsel inquiries and a Board order, but delivered a written reply on the day of the evidentiary hearing and participated therein); see also *In re Lilly*, 699 A.2d 1135 (D.C. 1997) (per curiam) (attorney who failed to respond to Bar Counsel communications, other than one request for a time extension, but filed a response to the complaint and appeared at the hearing – all over a one-year period – was found to violate Rule 8.4(d)).

We conclude the facts here meet the requirements of *Hopkins* and *Owusu*. Although Bar Counsel was able to eventually complete its

investigation, Bar Counsel's need to correspond repeatedly with respondent, to seek a Board order, and to file specification of charges, which ultimately elicited a written answer to the initial Bar Counsel inquiry (after a period of nearly seven months), meet the *de minimis* test. We find clear and convincing evidence of a Rule 8.4(d) violation.

2. Rule 8.1(b): Failure to Respond to Disciplinary Authority

Rule 8.1 (b) provides, in relevant part, that an attorney shall not "knowingly fail to respond reasonable to a lawful demand for information from . . . [a] disciplinary authority." Unlike the more general requirements of Rule 8.4(d). Rule 8.1(b) "specifically addresses the requirement of

responding to Bar Counsel." *In re Rivlin,* Bar Docket Nos. 436-96, et al., at 38 n. 20 (BPR Oct. 28, 2002), aff'd, *In re Rivlin,* 856 A.2d 1086 (D.C. 2004) (per curiam). In addition, failure to comply with Board orders can also subject an attorney to discipline under Rule 8.1 (b). *See Cater,* 887 A.2d at 17; *In re Beller,* 802 A.2d 340 (D.C. 2002) (per curiam).

As discussed in the Committee's Report, Respondent's initial delay in providing Bar Counsel with a written response can be justified in light of the health and office challenges with which she was dealing at the time and the fact that she did reach out to Bar Counsel by telephone and in person to try to discuss her response. Although she

may have acted "reasonably" at the outset, her failure to respond became unreasonable as the months accumulated. Though Bar Counsel's letters and telephone conversations, Respondent knew that Bar Counsel was determined to pursue the investigation and seek a Board order if necessary to compel a response. Despite this notice, she delayed in doing what was necessary to recover and examine the files she possessed regarding Mr. Green's representation.

It was only by December 1996, nearly three months after receiving Bar Counsel's initial letters, that Respondent informed Bar Counsel that she had sought assistance in reviewing her files and providing a response. BX 6(b) at 23. Yet she still

did not provide a response, even after she spoke with Bar Counsel's office the next month and was told a motion to compel was imminent. See BX 5 at 11. After Bar Counsel filed that motion in January 1997, Respondent did not provide a response; she did not provide a response when the Board granted the motion the next month either. It was only at this point that Respondent had re-hired her secretary in an effort to help her manage her office and workload, which she had difficulty doing as a solo practitioner and which was partly to blame for her failure to respond. BX 6(b) at 21.

Even after bringing in assistance, Respondent still did not respond within the ten days provided for in the Board's order. It appears

that Respondent only began to prepare a response in earnest after Bar Counsel filed its first petition and specification of charges in this matter in March 1997. BX 8 at 25-26. Despite that, after a month had passed, the attorney Respondent had retained to represent her asked for even more time to file an answer and to postpone a scheduled hearing . Finally, on April 30, 1997, Respondent provided her written response. BX 9 at 27-32.

Given these extensive delays and apparent lackadaisical approach toward resolving the issues that kept her from being able to respond, and the clear requirements of Rule 8.1 (b), the Board agrees with the Committee that Respondent knowingly failed to respond reasonably to Bar

Counsel's inquires.

3.D.C. Bar R. XI, § 2(b)(3): Failure to Comply with an Order of the Board

D.C. Bar R. XI, § 2(b)(3) states that an attorney is subject to discipline for "[f]ailure to comply with any order of . . . the Board issued pursuant to this rule." See *In re Kaufman,* 878 A,2d 1187m 1188 (D.C. 2005) (per curiam) (failure to comply with the Board's order to respond to Bar Counsel's inquiries); *In re Burnett,* 878 A.2d 1291, 1292 (D.C. 2005) (per curiam) (failure to participate in Board proceedings after ignoring Bar Counsel charges against him); *In re Artis,* 883 A.2d 85, 88 (D.C. 2005) (ignoring a Board order compelling a response to Bar Counsel

interrogatories).

As discussed, Respondent did not comply with the Board's February 12, 1997 order to respond to Bar Counsel within ten days. She eventually responded months later – after a specification of charges was filed against her and a hearing date was set. Thus, she also violated D.C. Bar R. XI, § 2(b) (3).

IV. RECOMMENDED SANCTION

Because the law is clear that misappropriation can result in the most severe possible penalty – disbarment – the Committee focused its sanction discussion on this charge and concluded that disbarment is the proper sanction here. The Board agrees.

As discussed in Part III, the Court has consistently held that "in virtually all cases of misappropriation stems from "nothing more than simple negligence." See *Adams,* 579 A.2d at 191. This is not a per se rule, but rebutting the presumption of disbarment is an uphill battle; a lesser sanction is appropriate only in "extraordinary circumstances."*Id.; see also Pels,* 653 A.2d at 397-98. One such mitigating circumstance is if an attorney's misconduct was substantially caused by certain disabilities, such as alcoholism. *Addams,* 579 A.2d at 194-95 (citing *In re Kersey,* 520 A.2d 321 (D.C. 1987)).[9] However,

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[9] See *In re Mooers,* 910 A.2d 1046 (D.C. 2006) (per curiam) (attorney's misappropriation of client's

"as a matter of course, the mitigating factors of the usual sort . . . will suffice to over come the presumption of disbarment only if they are especially strong and, where there are aggravating factors, they substantially outweigh any aggravating factors as well." *Id.* at 191 *(citing In re Reback*, 513 A.2d 226, 233 (D.C. 1986)). The burden is high because misappropriation is a breach of trust that strikes "at the core of the attorney-client relationship." *Id.* at 198-99.

A. Mitigating and aggravating Factors

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funds would not have occurred but for the depression he suffered at the time of his misconduct. Further, the attorney admitted and took full responsibility for his wrongdoing, corresponded with Bar Counsel, and was under treatment for his depression).

Mitigating factors "of the usual sort" include: "(1) an admission of wrongdoing, (2) full cooperation with the disciplinary authorities, (3) prompt return of the disputed funds, and, most importantly, (4) an unblemished record of professional conduct." *In re Pierson*, 690 A.2d 941, 950 (D.C. 1997) (citing Reback, 513 A.2d at 233). As the Committee Report makes clear, Respondent has not admitted any wrongdoing, but instead denies all the charges Bar Counsel brought against her. She did not cooperate fully with authorities, but instead delayed in preparing a written response to Bar Counsel's initial inquires and failed to comply with a Board order. Respondent did not promptly return disputed funds, but

instead retained Mr. Green's remaining $1,000 even after his condominium had gone into foreclosure. She does not have an unblemished record of professional conduct, but instead has recently concluded a six month suspension for negligently misappropriating another client's funds, for failing to maintain complete records, and for other violations. See *In re Edwards* (*"Edwards I"*), 870 A.2d 90, 92-93 (D.C. 2005).[10] In addition,

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[10] The six-month suspension actually began in September 2005 and ended in July 2006 due to a dispute over whether Respondent properly filed an affidavit pursuant to D.C. Bar R. XI, § 14(g), which affected the timing of reinstatement. R Brief at 11. Respondent even raises the argument that, since the facts here and in *Edwards I* grew out of the same time period, we should somehow assume both sets of facts were simultaneously before us and determine an appropriate sanction for the

the Board a few months ago issued a report

combined violations, citing *In re Thompson,* 492 A.2d 866 (D.C. 1985); R Brief at 11. First, unlike Thompson, the two matters are not before us simultaneously. Second, we do not – as Respondent does – look upon this overlap in time of her two separate misappropriations – both occurring in

.continued)
(. . .continued)
the mid 1990s – as somehow mitigating her sanction. See R Brief at 11. Following this logic, since Respondent has already been sanctioned for one misappropriation from that time period, the Board and Court should overlook any other indiscretions at that time. Of course, the current proof involves intentional misappropriation, not negligent misappropriation as in *Edwards I.* Further, if the instant facts had been somehow tried as a separate count in the *Edwards I* cases had been consolidated before the Board as in *Thompson*, thereby presenting the Boar and Court with a possible "pattern" of such misconduct, it is possible *Edwards I* would have resulted in a finding of reckless or intentional misappropriation, leading to an earlier disbarment recommendation. See *In re Edwards,* 808 A.2d 476,485 (D.C. 2002), on remand, 870 A.2d 90 (D.C. 2005).

recommending the Respondent be suspended for thirty days based on ethical violations resulting from her mishandling of a client's will. See, *In re Edwards*, Bar Docket No. 488-02 (BPR Dec. 18, 2006).

The mitigation issues raised by Respondent are either irrelevant, unpersuasive, or dubious. During the mitigation phase of the hearing, for example, she testified that a fire set in a building next to her Georgia Avenue office destroyed much of her own office and files — but that fire occurred in April 2004. Tr. At322, 330-31. Also in 2004, Respondent suffered a heart attack and the death of her husband. Tr. At 320-21; R Brief at 11. While the Committee and the Board sympathize

with Respondent, we note that these traumas took place ten years after Respondent first began representing Mr. Green. See *In re Bernstein*, 707 A.2d 371, 377 (D.C. 1998).

Closer to the time in question, Respondent testified that she has dealt with numerous health problems, including glaucoma, chronic migraine headaches, sinus problems, and upper respiratory problems. Tr. At 319-21. Also, during that time period, she and her husband faced marital difficulties and her husband suffered a heart attack. Tr. At 318. These circumstances, however, are not "extraordinary" in the *Addams* sense; they are simply the types of difficulties many people face during their lifetimes and cannot be the basis

for lessening sanctions for a violation as serious as intentional misappropriation. "[F]actors such as...ill health and pressures of work and illness and death among friends and relations [are] more appropriate for consideration upon [an] attorney's application for readmission to the bar." *Addams*, 579 A.2d at 198.

Respondent also testified that her Georgia Avenue office suffered a flood soon after she moved there in 1996 and around the time she began receiving Bar Counsel's inquiries in this matter. Tr. At 332-33. This event could not have had any bearing on Respondent's misappropriation, as that took place more than a year earlier, in the summer of 1995. Although a flood could have affected her

ability to respond to Bar Counsel's inquiries and comply with the Board's order, Respondent made no mention of a flood in her December 20, 1996 faxed letter to Bar Counsel explaining her delay in responding to Bar Counsel or in her April 30 1997 response to Bar Counsel's allegations. BX 6(b) at 23; BX 9 at 27-32. The Committee concluded that if a flood had affected Respondent's ability to cooperate with the investigation, she would have mentioned it; thus, the flood evidence has no mitigating effect on the ethical violations Respondent committed. The Board concurs.

The Board is concerned about the delay in investigating and adjudicating this case as was the committee. See HC Rpt. At 37-38. The facts in

Edwards I arose during the same approximate time frame—1996—and involved similar conduct, i.e., mishandling of client's funds and misappropriation in one matter. *Edwards 1,* 808 A.2d 476. However, much of this delay was brought on by Respondent's own actions. She was dilatory in providing answers to Bar Counsel's inquiries in 1996-97, moved to quash a Bar Counsel subpoena in 1998 that remained unresolved until October 2001 (to which she moved to reconsider), and was slow in answering the charges until May 2006. BC Brief at 13. We do not find the circumstances of this case surrounding the time delay so unique and compelling as to "justify lessening what would otherwise be the

sanction necessary to protect the public interest." *In re Fowler*, 642 A. 2d 1327, 1331 (D.C. 1994). Respondent also argued before the Committee that her need to defend against multiple charges from the same time

period somehow excuses the delays she created. The proposition that multiple disciplinary charges can be used to justify tardiness, and eventually to support mitigation, is rejected.

B. Sanctions

The Committee and the Board have found clear and convincing evidence of reckless misappropriation—indeed intentional misappropriation. Although Respondent remains

adamant that "there is no need to impose any discipline," these facts are well beyond slipshod bookkeeping. R. Brief at 13. Further, her disciplinary record is very unsatisfactory, including a finding of negligent misappropriation during this same mid-1990s time period. *See Edwards I,* 870 A.2d at 90. As recognized by the Court, "disbarment will be presumptively required if the attorney's conduct demonstrated an unacceptable level of disregard for the safety and welfare of entrusted funds." *Anderson,* 778 A.2d at 336.

We compare these facts to those in *Thomas-Pinkney* (disbarment for "a close case" or reckless misappropriation involving two different clients, but with mitigating evidence of no prior

disciplinary record and a "very considerable service to her community") and *Berryman* (disbarment for misappropriation of $939.84 under the attorney's belief she was entitled to it as partial payment of a $6, 000 legal fee, where mitigating factors included lack of financial harm to client and the absence of a prior disciplinary record). *In re Thomas-Pinkney,* 840 A.2d 700, 701 (D.C. 2004); *Berryman,* 764 A.2d at 760.

> We recognize that 'disbarment in a case such as this may seem to be a harsh sanction when compared with sanctions for other violations involving arguably more egregious conduct.' (Citations omitted). However, we are equally mindful that, 'where client funds are involved, a more stringent rule is appropriate to ensure that 'there not be an erosion of public confidence in the integrity of the bar.' (citation omitted).

Berryman, 764 A.2d at 774 (citing *Pierson*, 690 A.2d at 949).

The Board thereby agrees with the Committee and recommends disbarment for Respondent. We also agree that Respondent should be required to pay restitution to Mr. Green in the amount of $1,000, that portion of the $2,000 misappropriated funds she failed to repay, plus interest at the legal rate of 6% from June 7, 1995, the date of the initial misappropriation.

V. CONCLUSION

The Board concludes that Bar Counsel has proven by clear and convincing evidence that Respondent intentionally misappropriated client funds in violation of Rule 1.15(a); failed to

maintain complete financial records in violation of Rule 1.15(a) and D. C. Bar R. XI, § 19(f); failed to deliver to a client money to which he was entitled in violation of Rule 1.15(b); failed to surrender to a client property to which he was entitled in violation of Rule 1.16(d); failed to respond to a lawful demand for information from a disciplinary authority in violation of Rule 8.1(b); failed to comply with an order of the Board in violation of D. C. Bar R. XI, § 2(b)(3); and seriously interfered with the administration of justice in violation of Rule 8.4(d). We recommend disbarment and that as a condition of reinstatement, Respondent be restitution to her client in the amount of $1,000 with interest at the legal rate 6% from June 7,

1995.

BOARD ON PROFESSIONAL
RESPONSIBILITY

Dated: June 22, 2009

All members of the Board concur in this Report and Recommendation.

A true Copy
Test:
Garland Pinkston, Jr.
Clerk of the
District of Columbia
Court of
Appeals

BY /s/ Eric Brooks
DEPUTY CLERK

DISTRICT OF COLUMBIA COURT OF APPEALS BOARD ON PROFESSIONAL RESPONSIBILITY HEARING COMMITTEE NUMBER TWO

In the Matter of:	
LUCY R. EDWARDS,	
Respondent.	Bar Docket No 488-02
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No197020)	

REPORT AND RECOMMENDATION OF HEARING COMMITTEE NUMBER TWO

This matter was heard by Hearing Committee Number Two on November 1, 2005. Having considered the testimony, exhibits and arguments submitted by Bar Counsel and Counsel

for the Respondent, the Committee recommends that Respondent be suspended from the practice of law for thirty (30) days, that as a condition of reinstatement before she resumes the practice of law she cooperates with a practice monitor selected by the Board on Professional Responsibility, and that she be placed on probation for an additional period of six months during which she continues to work with the practice monitor who will report regularly to the Board on Professional Responsibility. The Hearing Committee further recommends that if Respondent fails to cooperate with the practice monitor or violates the terms of her probation, that she be subject to the revocation of probation and an additional 30-day suspension.

I. Background

Bar Counsel, in connection with a probate matter, has charged Respondent with violations of the following District of Columbia Rules of Professional Conduct ("the Rules"): 1.1(b); 1.3(b)(1); 1.15(a); 8.4(b) and 8.4(d).[11] By Answer, Respondent denied all the charges. RI, No. 7. An evidentiary hearing was held on November 1, 2005. Respondent was present and represented by counsel. Assistant Bar Counsel called 3 witnesses at the hearing - the Complainant, Shirley Dickerson-Fairley; Evan J. Krame, Esq., accepted

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[11] The Specification of Charges in Bar Docket No. 488-02 were filed on January 21, 2005. (Record Index "RI, No. 1).

by the Committee as an expert on wills, estates and probate (Transcript of November 1, 2005 hearing ("Tr.") at 71-72), and Respondent. Bar Counsel also moved the introduction of Bar Exhibits ("BX") A, D (pg 1-9), 1,2-A, 2-B, 2-C, 4 and 10 which were admitted into evidence without objection. Tr. At 172-173. Additionally, within 7 days of the close of the hearing, Bar Counsel moved to supplement the Record with a pamphlet published by the Superior Court entitled "When Somebody Dies ... General information for Heirs and Legatees in D.C.," which, over the objection of the Respondent, was admitted into evidence by the Chair as BX 14. (Hearing Committee Order, November 30, 2005).

Respondent testified on her own behalf during her case in chief. Bar Counsel recalled Shirley Dickerson-Fairley in rebuttal (Tr. at 224), and Respondent called Clementine Ruffin, a companion of Shirley Dickerson-Fairley's father, the decedent in this matter, in sur-rebuttal. Tr. at 240.

At the conclusion of the hearing the Hearing Committee made a tentative determination that Bar Counsel had sustained its burden with respect to showing a violation of Rule 1.15(a) and had not met its burden with respect to Rules 1.3(b)(1), 8.4(b) and 8.4(d). Tr. At 245-246. The Hearing Committee made no preliminary determination with respect to Rule 1.1(b). Tr. at 247.

Thereafter, during the aggravation and mitigation phase of the hearing, Bar Counsel introduced into evidence Bar Exhibits 13 A, and 13 B (Tr. at 247-248), two District of Columbia Court of Appeals decisions relating to a previous disciplinary matter involving Respondent.

II. Findings of Fact

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals having been admitted by examination on March 5, 1965, and subsequently assigned Bar number 197020. BX A; Tr. at 122-23.

2. In June 1994, Respondent was retained by William David Dickerson ("Mr. Dickerson") who had two living children, to draft his Last Will and

Testament (the "Will"). Tr. at 125-26. Mr. Dickerson paid Respondent $100 for this service. By the terms of Mr. Dickerson's Will, Dr. Shirley Dickerson-Fairley, his daughter, was designated as the sole beneficiary of his estate. BX 4 at 1-2.

3. In addition, Mr. Dickerson's Will named Respondent as the Personal Representative of his estate. Tr. at 127-128. At Mr. Dickerson's request, Respondent maintained the original Will at her law office, then located at 1424 K Street, N.W., Washington, D.C. 20005. BX 4 at 2; Tr. at 127-130.

4. Respondent's normal practice was to maintain the original of a will (such as Mr. Dickerson's) in her file cabinet (Tr. at 133), but she did not "have

a record that said that [she] had the original of" his Will. Tr. at 134.

5. In August 1996, Respondent moved her law office from 1424 K Street, N.W., Washington, D.C. 20005, to 3103 Georgia Avenue, N.W., Washington, D.C. 20010. BX 4 at 2, n.1; Tr. at 134-35. In August 2000, she again moved her office, this time to 3001 Georgia Avenue, N.W. Tr. at 135. Respondent kept her client's files in eight to ten file cabinets that were fire proof, but not necessarily waterproof, and in 8-10 boxes. Tr. at 143-144.

6. On October 13, 1998, when Mr. Dickerson died, he was a widower but lived with a companion. Soon after Mr. Dickerson's death Respondent was

advised of it by Mr. Dickerson's companion. BX 4 at 3.

7. At the time of his death Mr. Dickerson owned his own residence on Benning Road, N.E., where he had lived since the 1940s. Tr. at 17-18.

8. Following her father's death, decedent's daughter, Dr. Shirley Dickerson-Fairley obtained a copy of her father's Will. Tr. at 18-19; BX 2(C).

9. Because she did not locate the original Will in her father's home and after noticing that Respondent was nominated in her father's Will to serve as the personal representative of his estate, Dr. Dickerson-Fairley attempted to contact Respondent at her K Street, N.W., office but she testified no one answered the phone. Tr. at. 21.

Thereafter, Dr. Dickerson-Fairley succeeded in contacting Respondent, made an appointment to meet with her, and, after Respondent failed to appear for their first appointment, the two either met or talked in either late 1998 or early.[12] Tr. at 21-23.

10. In their discussion, Dr. Dickerson-Fairley advised Respondent that she had drafted her

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[12] Dr. Dickerson-Fairley recalls meeting with Respondent near Georgia Avenue and Columbia Rd (Tr. at 27-28), which corresponds closely to where Respondent had her office in the late Fall of 1998. Tr. at 136. Dr. Dickerson-Fairley was able to identify Respondent at the disciplinary hearing in October 2005. Tr. at 25-26. Respondent recalls speaking with Dr. Dickerson-Fairley, but not necessarily meeting with her at that time. Tr. At 145. It is not necessary for the Committee to resolve whether the ensuing discussion was in person or over the phone.

father's Will, which Respondent recalled, and that Respondent had both been named as personal representative in the Will and retained the original copy of the Will, neither of which Respondent initially recalled. Tr. at. 60-61, 145, 155, 157. Respondent does not believe she received a copy of the Will from Dr. Dickerson-Fairley at this time. Tr. at 156. Respondent advised that she would look for Mr. Dickerson's original Will, and would call Dr. Dickerson-Fairley after she found it. Tr. at 22-23. Apparently during this first discussion Respondent must have expressed some concern about her ability to locate the Will because of a flood she had at her office. Tr. at 61, 140; BX 4 at p. 3. Dr. Dickerson-Fairley received no calls from

Respondent. Tr. at 22-23.

11. Although Respondent testified that independent of the file she normally would have had "some records" that would indicate that she maintained an original will, when conceded that she had none that showed that she had retained this will. Tr. at 133-134, 162-163; But see Tr. at 138. Also, at that time, Respondent did not keep a record of where different files may have been located in her office. Tr. at 217.

12. Between 1999 and 2002, Dr. Dickerson-Fairley was living at times away from her home in Silver Spring, Maryland, because her home had been declared unfit for habitation following a flood. Tr. at 23-25. For about one year, apparently

sometime between the latter part of 2000 and 2002, she lived in Memphis, Tennessee. Tr. at 25, 39. Dr. Dickerson-Fairley testified that after she had her initial meeting or discussion with Respondent, she continued to attempt to contact Respondent but was unable to locate and reach Respondent claiming that Ms. Edwards' phone was unlisted or out of service. Tr. At 34-35, 66-67, BX 2A at 2. It appears that at least some of the attempts to reach Respondent about which Dr. Dickerson-Fairley testified were at Respondent's former K street address at a time after Dr. Dickerson-Fairley already knew and, according to her testimony, had already met with Respondent at 3103 Georgia Avenue. Tr. at 27, 66-67.

13. Respondent testified that her phone was listed and her service was not suspended (Tr. At 176-177) and that her phone number was listed with the District of Columbia Bar. Tr. at 177. Besides Dr. Dickerson-Fairley's testimony there was no evidence that Respondent's business phone was ever disconnected or unlisted.

14. It is not clear to the Hearing Committee why Dr. Dickerson-Fairley who, according to her testimony, had once contacted and visited Respondent's office, would have been unable to find Respondent again either by telephone or during one of her visits to Washington, D.C. Accordingly, despite Bar Counsel's invitation to conclude otherwise, we find Complainant's description of her

efforts to contact Respondent unclear (Tr. at 34-40, 66-67) and thus fail to find clear and convincing evidence that Dr. Dickerson-Fairley made numerous significant attempts to re-contact Respondent.

15. We have no reason to doubt Respondent's testimony that she did not recall that she had retained the original Will (Tr. at 164), or, that in the period immediately following her discussion with Dr. Dickerson-Fairley in late 1998 or early 1999, that she had searched for but could not locate Mr. Dickerson's last Will. Tr. at145-146, 180-181. Nonetheless, and notwithstanding Respondent's testimony to the contrary (Tr. at 146-147, 220), we are unable to conclude that

Respondent continued to search for the Will after that initial period through approximately 2002.

16. At no point after their discussion in late 1998 or early 1999 through at least September 2002 did Respondent attempt to re-contact Dr. Dickerson-Fairley to apprise her of the results of whatever searches she had made for the will; she did not inform her that the Will could not be found or take any other action in connection with the Will. Tr. at 206-207.

17. In mid-2002, Dr. Dickerson-Fairley learned that Respondent was renting office space from a friend of Dr. Dickerson-Fairley. The friend provided Dr. Dickerson-Fairley Respondents' then current office address. Tr. at 28-29. In a letter

dated September 24, 2002, Dr. Dickerson-Fairley wrote Respondent, reminding her of their earlier meeting regarding Mr. Dickerson's Will and the need to locate the original so it could be filed with the Superior Court of the District of Columbia. BX 2(A). In her letter, Dr. Dickerson-Fairley requested that Respondent "respond to [her] letter in five days," adding that if she did not get a response by October 1st she would forward a copy of the letter to the Bar Association. *Id.* at 2. Respondent received this letter and renewed her effort to locate Mr. Dickerson's last Will. Tr. at 148-149.

18. By late October when she heard nothing from Respondent, Dr. Dickerson-Fairley filed a

complaint with Bar Counsel alleging that Respondent had failed to probate her late father's Will. BX 1. Bar Counsel received the complaint on October 23, 2002 (BX 1) and then by letter of November 25, 2002 first notified Respondent of the complaint against her. BX 3.

19. Some time prior to November 4, 2002, Respondent located Mr. Dickerson's last Will (Tr. at 149; BX 2(B)) and then notified Dr. Dickerson-Fairley. Tr. at 30. According to Respondent, she located the Will in some portion of the probate section of her files (Tr. at 133, 149, 166), arguably, by Respondent's admission, in the file where it was expected to be (Tr. at 218-219), although how the files were regularly maintained and where this file

should have been maintained is not completely clear. See, Tr. at 166-171, 181, 191-193, 215-217,. At that time Respondent did not keep a file index of where different files may have been located. Tr. at 217.

20. When Dr. Dickerson-Fairley called Respondent's office she was told she could meet Respondent in December. Tr. at 30. On November 8, 2002, Dr. Dickerson-Fairley wrote and requested Respondent to send her the Will. BX 2(B); Tr. at 30.

21. Approximately one week later, Dr. Dickerson-Fairley went to Respondent's office and picked up her father's Will, along with Respondent's renouncement of her appointment as

personal representative of Mr. Dickerson's estate, and "took it to the Probate Court." Tr. at 31-32.

22. As of the date of the Hearing in this matter, Complainant had still not caused to be filed a petition to probate the estate of her father. Tr. at 43.

III. Conclusions of Law

We conclude that Bar Counsel has met its burden to show by clear and convincing evidence violations of Rules 1.15(a) and Rule 1.1(b), but has not met its burden with respect to Rules 1.3(b)(1), 8.4 (d), and 8.4(b).

A. Rule 1.15(a):

Rule 1.15 is entitled "Safekeeping Property." Rule 1.15(a) describes a lawyer's duties with

respect to holding the property of a client and other persons. It describes in detail the requirements for holding funds and then goes on to require that "[o]ther property shall be identified as such and appropriately safeguarded." Comment 1 provides that "[a] lawyer should hold property of others with the care required of a professional fiduciary."

The great bulk of disciplinary matters under Rule 1.115 have involved commingling and misappropriation of clients funds. Rule 1.115 cases, however, extend beyond commingling and misappropriation cases to those involving the safekeeping of client's and other's valuables and keeping appropriate records. Thus, in *In Lenoir,* Bar Docket Nos., 053-86 *et al.* (BPR March 21,

1990) aff'd, 585 A.2d 771 (D.C. 1991) (per curiam), where a lawyer was given a will to probate and five checks made out to the decedent but failed to deposit the checks and misplaced the checks in an unrelated file, the Board found a violation of then Rule DR 9-103(B)(2), the predecessor of current Rule 1.115(a). The Board noted: "[t]he checks were obviously 'property of a client' and Respondent clearly failed to put them in a 'place of safekeeping as soon as practicable.;" *Id.* at 779. Similarly, in *In re Delate,* Bar Docket No. 364-89 (BPR May 13, 1991), aff'd, 598 A.2d 154 (D.C. 1991), the Board found a violation of DR 9-103(B)(3) (failure to maintain complete records), where the records were vague and poorly maintained.

In July 1998, in Ethics Opinion No. 283, the Bar was advised (albeit in the context of a withdrawal of representation) that a lawyer is obligated to protect and preserve "valuable property" in his client's file, including documents that "directly affect [] valuable rights," such as "securities, negotiable instruments, deeds, settlement agreements and wills," documents that have intrinsic value or that directly affect valuable rights. Eth. Op. No. 283, "Disposition of Closed Client Files" (adopted July 15, 1998), at 2. In that same opinion the Ethics Committee noted that including wills within the definition of "other property" was a "reasonable interpretation" of that

term.[13]

Evan J. Krame, Esq., accepted by the Hearing Committee without objection by the Respondent as an expert in probate matters, testified that wills should be "protected from the elements and easily identified. . . . The average practice would be [to]

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[13] In 1999, the New York State Bar Association advised its Bar that there will ordinarily be an implied understanding that, after the client's death, "if the lawyer has maintained the client's original will . . . the lawyer must take steps to assure that the executor and/or beneficiaries are aware of its existence," unless the lawyer knows of a later valid will. Opinion 724 - 11/30/99, titled "Wills; Obligations of law firm in regard to wills in its Custody" at 1. The New York Ethics Committee further advised "when the lawyer does agree to retain the client's original will, the lawyer obviously may not destroy it, but must keep it in custody until the client requests it or the lawyer is legally obligated to produce it. "*Id.* (Footnotes omitted).

catalog whatever original documents one has in his possession, keep a list of them, keep them in an organized fashion, usually in alphabetical order." Tr. at 74. Mr. Krame initially testified that the misplacing of a will violated the duty of care to safekeep property (Tr. at 111, 113), but ultimately somewhat amended his view:

> Because misplacing a document of this nature entails several levels of mistake, because these documents are typically cataloged, I keep an index of them, I know where they are supposed to be located, merely misplacing it, alone, may not raise to the level of being a breach of one's fiduciary duty or ethical obligation, but the inability to find it, would rise to that level, because I would have a record somewhere, telling me that I've got this will, and if I can't find it where I think it's supposed to be, there's only so many boxes or so many filing cabinets where I should be looking to find it.

Tr. at 118.

The Hearing Committee has little doubt that subsumed within the concept of safekeeping the valuable property of a client or others is the ability to locate that property so it can be timely used for the benefit of or on behalf of the client or for another person for whom the property is held.[14] In this case, at a minimum, that means upon being informed by the Will's sole legatee, to who Respondent had a fiduciary responsibility (Tr. at 116), that Respondent was the named person personal representative and had possession of the

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[14] We note that Rule 1.15(b) provides that "a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive . . . ."

original of Mr. Dickerson's Will, Respondent had a duty to locate the Will.

While, without more, we would be somewhat loathe to find ethical violations merely because a document, albeit with some value, could not be located, here there is more. Given the potential for mischief in probate proceedings, heightened by the lack of an original will, we believe that a will is the type of property that deserves the utmost protection, and the availability of procedures for probating a lost will does not mitigate that obligation to provide the utmost protection.

Here, a number of things are clear. Neither Respondent's failure to recall she retained the original Will or her inability to find it relieve her of

responsibility. The original search for the Will was not sufficiently thorough- the Will wasn't found; yet years later, and after the threat of disciplinary proceedings, the Will was found, and, according to Respondent's testimony, found in that section of the files where it should have been located, albeit slipped down between other files. Tr. at 218. It does not appear that Respondent drafted that many wills, the originals of which she was asked to retain in her files (Tr. at 159-161), or that the probate section of her files was so extensive (Tr. at 219-220) that it should have taken almost four years to find the Will. Moreover, Respondent's difficulty in locating her files (or knowing which parts of her files on which to expend the most effort

to locate the Will) appears to have been exacerbated by the way she maintained her files. Respondent's testimony indicated she did not have, as she should have had, a clear system as to where files would be maintained (Tr. at 166-169; 215-217), and, most significantly, any kind of index or catalog for her files. Tr. at 138, 217. In other words, when Respondent was informed by the Complainant that she believed that Respondent retained the original Will and when she could not immediately locate it in her files, she had no place to check.

While how a practitioner chooses to maintain her files is not regulated by the Bar and normally would be of little concern to disciplinary

authorities, the choices Respondent made about her files became significant when it meant that there was nowhere she could check the claim that she was indeed the personal representative and had retained the original Will, and a document like a will could not be located. We conclude that Respondent violated Rule 1.15(a) for failing adequately to safeguard property that was valuable to her client and to an individual (the Complainant) to whom she had a fiduciary duty.

B. Rule 1.1(b)

Rule 1.1(b) requires a lawyer to "serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." Comment 1 states "[i]n

determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include . . . the lawyer's training and experience in the field in question."[15] Comment [5] observes, among other things, that "[c]ompetent handling of a particular mater includes . . . use of methods and procedures meeting the standards of competent practitioners." The abandonment of a client's interest is not legal representation consistent with the skill and care required by Rule 1.1(b) (*In re Lewis*, 689 A.2d 561

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[15] Although Comment 1 is directed to Rule 1.1(a), as the Board recently stated the "same failings that constitute . . . 1.1(a) violations constitute 1.1(b) violations." *In re Evans,* Bar Docket No. 049-98 at 26 (BPR May 31, 2005), aff'd, 2006 WL 1097485(D.C. April 27, 2006).

(D.C. 1997)), nor is "dropping the ball" in a legal matter. *In re Sumner*, 665 A.2d 986, 989 (D.C. 1995).

Although we made no preliminary non-binding determination with respect to Rule 1.1(b) (Tr. at 247), we now conclude that Respondent violated that rule by her failure to serve Mr. Dickerson (and his daughter) with the skill and care commensurate with that generally afforded to clients by other lawyers in similar matters. Mr. Krame, Bar Counsel's expert witness, opined that when a lawyer agrees to hold a client's will he must deposit the document in a safe place where it can easily be found, and must establish a list delineating what original documents he holds and

where the documents can be located. To the Committee these minimal standards flow not only from common sense, but also from a lawyer's training and experience in the probate field and represent the methods and procedures that comprise competent practice. When the failure to utilize such methods and procedures leads to the abandonment of a client's interest or the dropping of the ball Rule 1.1(b) has been violated.

Here Respondent recalled neither that Mr. Dickerson's Will named her as his personal representative nor that she retained a copy of the original Will. When informed of both matters shortly after her client's death, she was unable to locate the Will from the point until October 2002.

Although she had in fact retained the Will, Respondent neglected to establish or utilize a system b which she could easily determine that she had her former client's Will and that she was the personal representative. Accordingly, the original Will was not available to be filed with the Probate Court by either her or someone else. Under the circumstances this constitutes a violation of Rule 1.1(b).

C. Rule 1.3(b)(1)

Rule 1.3(b)(1) provides that "a lawyer shall not intentionally fail to seek the law ful objectives of a client through reasonably available means permitted by law and the disciplinary rules." As Comment 5 notes, "[i]n th exercise of professional

judgment, a lawyer should always act in a manner consistent with the best interests of the client." As Comment 7 notes, "no professional shortcoming is more widely resented by clients than procrastination. A client's interest often can be adversely affected by the passage of time or the change of conditions . . ." Finally, Comment 8 states that "[u]nless the relationship is terminated . . . a lawyer should carry through to conclusion all matters undertaken for a client."

Intentional misconduct may be inferred from Respondent's failure to act. *In re Delate,* 579 A.2d 1177, 1179 (D.C. 1990). "Neglect ripens into an intentional violation when the lawyer is aware of his neglect of the client matter, or the neglect is so

pervasive that the lawyer must be aware of it." *In re Lewis*, 689 A. 2d 561, 564 (D.C. 1997)(citing *In re Reback*, 487 A.2d 235, 240 (1985), rev'd on other grounds, 513 A.2d 226 (D.C. 1986)(en banc)).

Bar Counsel has charged Respondent with a violation of Rule 1.3(b)(1) based on the fact that Respondent was aware since 1994 that her client, Mr. Dickerson, wanted her to probate his will following his death, and that Respondent failed timely to take the Will to the Superior Court to file it with the Register of Wills, and to initiate the probate of his estate. Bar Counsel's Proposed Findings of Fact and, Conclusions of Law, and Recommendation as to Sanctions at 14-15. Bar Counsel argues with some force that Respondent's

claim that she continuously search for the Will is not credible (a contention with which we do no disagree), and that her failure to locate the Will for approximately four years and to submit it to probate indicates that she was aware of her neglect and constitutes pervasive neglect sufficient to make out a violation of Rule 1.3(b)(1). Nonetheless, we conclude, that under the circumstances of this case there is insufficient evidence to establish a violation of Rule 1.3(b)(1).

At bottom, the Committee concludes that this case involves a Will that was negligently misplaced. To be sure, and as we have held in finding violations of Rules 1.15(a) and 1.1(b), Respondent lacked a sufficient record-keeping

system that was responsible for the Will not being able to be located. Arguably, because Respondent was named as the personal representative in the will she had an independent obligation to her former client to begin the probate process on behalf of the Will's beneficiary (Tr. at 77), although her former client had made no specific arrangements to pay a fee for that service. Tr. at 187. Had Respondent timely located the Will there presumably would have been a discussion with Dr. Dickerson-Fairley, as the sole beneficiary of the Will, on how she would have liked Respondent to proceed. Thus, we do not find that Respondent's failure to immediately probate the Will constitutes an intentional failure to seek the lawful objectives

of her client.

In any event, Respondent could not do what it was not possible to do- that is, probate a will that could not be located. While we do not credit Respondent's claim that she continuously searched for the Will over the 4 year period, based on Dr. Dickerson-Fairley's previously referenced confused testimony, we also do not credit her claim that she repeatedly attempted to reach Respondent during that same 4 year period. We do not believe that the failure to find the Will, albeit maintained in an inadequate filing system, and the concomitant failure to probate the Will during the four year interim period, constitutes an intentional failure to seek the lawful objectives of Respondent's client

and her sole legatee. Much as the Board did in *In re Lenoir*, 585 A.2d 771 (D.C. 1991)(per curiam), another case involving the failure to probate a will, we conclude the proper balance to be found here is to find that Respondent was deficient with respect to the skill and care in connection with the representation (Rule 1.15(a)), failed to adequately safeguard her client's property so it was available for his, or his heir's benefit (Rule 1.1(b)), but did not intentionally fail to pursue a client's objective. Rule 1.3(b)(1). *See, In re Lenior,* supra, 585 A.2d at 778-79.

D. Rule8.4(d)

Rule 8.4(d) provides that it is professional misconduct for a lawyer to "engage in conduct that

seriously interferes with the administration of justice." To find a violation of this disciplinary rule, there are, in general three tests: first, "the conduct itself must bear directly upon the judicial process- i.e. the 'administration of justice'- with respect to an identifiable case or tribunal", second, "[t]he proceeding implicated by the conduct must "'at least potentially impact upon the process to a serious and adverse degree,'" *In re Mason,* 736 A.2d 1019, 1023 (.D. 1999) (quoting *IN re Hopkins,* 677 A2d. 55, 61 (D.C. 1996); *In re Keiler,* 380 A.2d 119, 123 (D.C. 1977) (per curium)) (Court was interpreting the ethical rule that applied to attorney conduct prior to January 1, 1991).

We accept that "an attorney's improper conduct

can be prejudicial to the administration of justice not only by bearing directly on the judicial decision-making function, but also by bearing directly on the judicial process in general." *In re Hopkins, supra,* 677 A.2d at 60. As such, because a personal representative is judicially appointed and is subject to the court's authority, misconduct or derelictions by a personal representative can violate the Rule. *Id.*

Bar Counsel argues that Respondent's conduct had an adverse impact on the judicial process in that pursuant to D.C. Code § 18-111 Respondent was required to deliver a copy of Mr. Dickerson's Will to the probate court or the Register of Wills upon learning of his death, that by losing the Will

Respondent prevented the timely opening of his estate, and that by failing to safekeep her client's Will Respondent frustrated the probate process to the detriment of her client's heir, all of which taken together make out a violation of Rule 8.4(d).

We conclude that Respondent has not violated 8.4(d). While the intent of D.C. Code § 18-111 is no doubt to require the prompt probating of wills, the literal language requires that either the will be delivered to the probate court, the Register of Wills or to the executor named in the will, which in this case was Respondent herself. Further, no arrangements had been made to compensate Respondent for her services in connection with the probate process. And, as we previously said,

Respondent could not do what it was not possible to do to probate a will that could not be located. Under these circumstances, we cannot conclude that Respondent's conduct seriously and adversely affected the judicial process such that we can say that it interfered with the administration of justice.

E. Rule 8.4(b):

Bar Counsel has abandoned the alleged violation of Rule 8.4(b). See Bar Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendations as to Sanctions, at 9, n.1. Rule 8.4(b) declares that it is professional misconduct to commit a criminal act that reflects adversely on a lawyer's honesty, trustworthiness or fitness. Bar Counsel alleged

that Respondent violated D.C. Code § 18-111, which carries a fine of $500, by failing to deliver Mr. Dickerson's Will within 90 days to the Register of Wills, and thus violated Rule 8.4(b). Specification of Charges, RI No. 1 at 2-3. We agree with Bar Counsel's judgment to abandon this charge in light of the fact that Section 18-111 is violated only if an individual who has possession of a will fails to deliver that will within 90 days to either the probate court, the Register of Wills or to an executor named in the will. Here, Respondent herself was named as the personal representative in the Will, and we cannot say that in such circumstances her failure to deliver the Will to the Register of Wills or the probate court clearly

violated the dictates of the statute.

IV Proposed Sanctions

The object of disciplinary sanctions is not to punish the attorney, but "'to serve the public and professional interest identified and to deter future and similar conduct.'" *In re Ryan,* 670 A.2d 375, 380 (D.C. 1996)(citing *In re Goffe*, 641 A.2d 458, 464 (D.C. 1994)). The disciplinary system generally examines seven "well-settled" factors in order to arrive at appropriate discipline that is consistent with other cases and not otherwise unwarranted. D.C. Bar R. XI. § 9(g)(I); *In re Ryan*, 670 A.2d at 380; *In re Waller*,573 A.2d 780, 784-85 (D.C. 1990). These include: prior discipline, seriousness of the misconduct, prejudice to the

clients, violation of other disciplinary rules, dishonest conduct, prejudice to the clients, violation of other disciplinary rules, dishonest conduct, Respondent's attitude, and circumstances in mitigation. See, *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987)(en banc); *In re Slatery*, 767 A. 2d 203, 214-15 (D.C. 2002); *In re McLain*, 671 A.2d 951, 954 (D.C. Cir 1996); *In re Jackson*, 650 A.2d 675, 678 (D.C. 1994); *In re Hill*, 619 A.2d 936, 939 (D.C. 1993).

"The appropriate sanction is what is necessary, under the circumstances of each case, to protect the public and the courts, to maintain the integrity of the profession and 'to deter other attorneys from engaging in similar misconduct.'" *In re Owusu*, Bar

Docket No. 109-02 at 17 (BPR, July 30, 2004) (quoting *In re Uchendu*, 812 A.2d 933, 941 (D.C. 2002)). The purpose in imposing discipline is not to punish the attorney, but as a means to ensure the attorney's fitness to practice and to protect the public from misconduct by attorneys which may cause them harm. See, *In re Kennedy*, 542 A.2d 1225, 1230 (D.C. 1988); *In re Steele*, 630 A.2d 196, 200 (D.C. 1993).

Bar Counsel proposes that Respondent be suspended for either 60 or 30 days, in addition to the current suspension she is presently serving, with her reinstatement being conditioned upon a showing of fitness. Compare Bar Counsel's Proposed Findings of Fact and, Conclusions of Law,

and Recommendation as to Sanctions at 21 (60 days) with Reply Brief of Bar Counsel at 9 (30 days). Respondent proposes that no sanction be imposed. Respondent's Brief at 708.

A. Seriousness of the Misconduct

"The range of sanctions for cases involving neglect extends from public censure to disbarment. Where in that range the sanction is set depends on a number of factors, including the number of violations, whether the violations include intentional failures, whether they include dishonesty, the respondent's disciplinary history and the respondents appreciation of and attempts to rectify his misconduct." See, *In re Mance*, Bar Docket No. 031-01 at 26(BPR July 23, 2004).

The Hearing Committee has found a violation of Rules 1.15(a) and 1.1(b), essentially for failing to safekeep Mr. Dickerson's Will because Respondent was unable to locate it when requested to do so, and by not having a record-keeping and index system commensurate with that generally maintained by other lawyers in similar matters. Rule 1.15 violations often deal with commingling and misappropriation of funds, matters generally more serious than misplacing or failing promptly to locate a will. On the other hand, Respondent's inadequate record-keeping and index system and general lack of care precluded the original Will from being available to be probated at an earlier time.

B. Prejudice to the Client

While "prejudice is not an element of neglect as that violation is defined[,] . . . the existence vel no of prejudice to the client may be relevant on the issue of sanction." *In Matter of Bank*, 461 A.2d 1038, 1040-41 (D.C. 1983). The obvious prejudice in this case as a result of Respondent's failure to locate Mr. Dickerson's original Will was that it was unavailable to be probated for four years. As a practical matter this affected principally the legal transfer of Mr. Dickerson's home to his daughter, his sole legatee and the Complainant in this case. While Dr. Dickerson-Fairley testified as to some expenses because she could not transfer the house. (Tr. at 42-45), as the Committee has previously

noted we were less than impressed with her efforts to reconnect with Respondent to find out what was going on in connection with her father's Will. We further note that as of the date of the hearing in this matter the Will still had not been probated or the house transferred. Tr. at 235-239.

C. Violation of Companion Provisions of the Rules

As noted, the Hearing Committee has found a violation of Rules 1.15(a) and 1.1(b), essentially for failing to safekeep Mr. Dickerson's Will because Respondent was unable to locate it when requested to do so and by not having a record-keeping and index system commensurate with that generally maintained by other lawyers in similar matters.

D. Conduct involving Dishonesty or Misrepresentation

As Bar Counsel concedes, Respondent has not been charged with engaging in dishonest conduct. Bar Counsel concedes, Respondent has not been charged with engaging in dishonest conduct, Bar Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendations as to Sanctions at 23.

E. Prior Discipline

Respondent has a record of prior discipline and began serving a six month suspension in September 2005. *In re Edwards,* 870 A.2d 90(D.C.

2005).[16] Respondent's six month suspension, with conditions, stemmed from her negligent misappropriation of a client's fund in June 1996. Id.; *In re Edwards*,808 A.2d 476 (D.C. 2002). In 2002, while rejecting the claim of misappropriation with respect to another client, the Court did note that Respondent's failure to deposit that client's funds may have violated her obligation to safeguard client property pursuant to Rule 1.15(a). Id. at 480; BX 13(b) at 13-14.

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16 The Court's 2005 opinion sustaining the Board's recommended six month suspension for the misappropriation of a single client's funds, followed a previous remand to the Board in 2002 after a finding that there had been no misappropriation with regard to the funds of other clients.

F. Respondent's Acknowledgment of the Misconduct

This was a contested proceeding. Respondent did not acknowledge any misconduct. She did, however, concede that she lacked a sufficient index to be able to locate and search for a document like a will. Tr. at 138, 217.

G. Mitigating Factors

Respondent testified that she now keeps an index of important documents. Tr. at 217.

H. Sanction

Considering all the foregoing the committee recommends a suspension of 30 days. If Respondent did not have a prior record of discipline, it is possible that a recommendation of

a public censure would have been sufficient for the Hearing Committee. See, e.g., *In re Clower*, 831 A.2d 1030 (D.C. 2003) (public censure imposed for a violation of rules 1.15(a) and (b) for not fulfilling record-keeping obligations with respect to a client's settlement funds and not making prompt payment). Bar Counsel has not directed our attention to any case with similar facts that led to any period of suspension.[17]

Here however, Respondent first came to the attention of Bar authorities in 1996 and was

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[17] Curiously, in the conclusion of Bar Counsel's Proposed Findings of Fact, Conclusions of Law and Recommendation as to Sanction, Bar Counsel asks that we impose sanctions in light of "Hill, Jones and Banks," three cases not previously cited by Bar Counsel and for which no citation is provided.

ultimately found to have committed misconduct for events occurring I June 1996. *In re Edwards, supra,* 808 A.2d 476, 478 (D.C. 2002). In connection with the proceedings that ultimately developed from that investigation, Respondent testified "that her mishandling of client funds was a product of confusion and disorganization within her office." *In re Edwards,* supra 870 A.2d 90, 93 (D.C. 2005). This Committee has essentially found that Respondent's inability to locate Mr. Dickerson's Will in 1998 or 1999 was a product of confusion and disorganization that apparently still existed within Respondent's office (although the Will was drafted and presumably filed in 1994), at least as it related to her record keeping and index

system and her ability to safeguard her client's valuable property in such a way so that it could be timely accessed for the benefit of her client's beneficiary. In addition, we have concluded that Respondent's inability to locate Mr. Dickerson's Will meant that she was unable to serve his interests and those of his beneficiary with the appropriate skill and care required of a lawyer practicing in this field. Respondent's prior disciplinary matter resulted in a finding that she had violated Rule 1.15(a), which is one of the Rules we have found to have been violated in this matter, albeit under a different factual scenario. Taking these factors together we conclude that a thirty day suspension is warranted.

Bar Counsel also requests that a requirement to demonstrate fitness prior to returning to the practice of law also be imposed. Bar Counsel's Proposed Findings of Fact, Conclusions of Law and Recommendation as to Sanction at 27. The Court of Appeals has recently made clear that the imposition of a fitness requirement is "an appropriate response to serious concerns about whether the attorney will act ethically and competently in the future, after the period of suspension has run." *In re Cater*, 887 A.2d 1, 22 (D.C. 2005). The Court explained that its "concern is that [the attorney's] 'resumption of the practice of law will not be detrimental to the integrity and standing of the Bar, or to the administration of

justice, or subversive to the public interest.'" *Id.* at 22 (quoting *In re Steel*, 630 A.2d 196, 201 (D.C. 1993)).

To implement that purpose the Court held "the most appropriate standard is whether there exists a 'serious doubt' of a respondent's fitness to practice law. This means . . . that to justify conditioning the reinstatement of a suspended attorney on proof of rehabilitation, the record in the disciplinary proceeding must contain clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law." *Id. at 24.* The Court also noted that while a fitness requirement is not as severe as disbarment, it comes close (id. At 25) and that there should be

reluctance to impose it if the need is not amply demonstrated as it "may have the practical effect of greatly prolonging . . . a respondent's period of suspension." *Id.* at 23 (quoting *In re Edwards, supra,* 870 A.2d at 97).

Applying those standards we decline to recommend imposition of a fitness requirement. We do no believe that Bar Counsel has met its burden to show by clear and convincing evidence in the record that Respondent is not fit to practice law in the District of Columbia. While we have expressed serious concerns about Respondent's office procedures and filing and record-keeping system, and based on those concerns have found a violation of two disciplinary rules, we cannot say

that those deficiencies rise to the level of creating serious doubt about Respondent's fitness to practice law. Finally, to impose a fitness condition in this case in conjunction with the 30 day suspension we've recommended, surely would have the practical effect of greatly multiplying the effective period of suspension.

In reaching this result we are very cognizant of the Court of Appeals second opinion in the previous disciplinary matter involving Respondent. *In re Edwards,* 870 A.2d 90 (D.C. 2005)(*Edwards I*). That decision noted that in matters where the imposition of a fitness requirement is deemed excessive, but "where a respondent manifestly has difficulty implementing necessary reforms, some

effective means of protecting the public must be instituted. The question . . . therefore is, whether there exists a reasonable alternative to a fitness requirement." *Id.* at 97. The availability of an alternative condition in lieu of a fitness requirement remains a viable option for Hearing Committees and the Board even after *Cater*. *In re Cater,* supra, 887 A.2d 1, 23, n. 27.

In the 2005 Edwards opinion the Court affirmed a six month suspension for Respondent without the imposition of a fitness requirement, for negligent misappropriation of entrusted funds and related commingling and deficient record-keeping violations. While Bar Counsel had sought a fitness requirement and the Board had recommended

three hours of continuing legal education on the handling of entrusted funds, the Court rejected the proposed fitness requirement, affirmed the three hours of CLE, and also required Respondent to begin cooperating with a practice monitor selected by the Board. The monitor was to "assist and advise respondent regarding her record keeping, escrow and trust accounts, handling of client and other entrusted funds, and related matters [ ]," and she was ordered to continue to cooperate with the monitor for a period of sic months after her suspension ended. *Inn re Edwards,* supra, 870 A.2d at 99.

To be sure, and in light of the previous discipline proceeding, had Bar Counsel prevailed

on some of the more serious charges against Respondent in the current Petition we would have been more inclined to recommend a fitness requirement. In the end, however, and as noted above, we cannot say that Bar Counsel has demonstrated by clear and convincing evidence that Respondent is not fit to practice law. The violations we have found tend to flow from the same disorganization in Respondent's office that characterized the previous disciplinary matter and arguably are less serious, so, that notwithstanding that prior matter, we have not recommended a showing of fitness. We also note that the facts and circumstances giving rise to the violations we have found her occurred prior to the imposition of

discipline resulting from the prior proceeding against Respondent and before she had the opportunity to work with, and presumably benefit from, the practice monitor selected to work with her. Accordingly, in lieu of recommending the imposition of a fitness requirement, we recommend that Respondent work with a practice monitor, particularly on the deficiencies that led to the findings of violations in this case, on the same terms and conditions as previously imposed by the Court of Appeals,[18] during both her period of

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[18] Those terms and conditions are that Respondent work and cooperate with the practice monitor during the period of suspension, that the practice monitor submit a report to the Board, with a copy to Bar Counsel at the conclusion of Respondent's suspension and that Respondent

suspension and during a six month probationary period, pursuant to D.C. Bar Rule XI, § 3(a)(7), which we al recommend.

V. Conclusion

For the foregoing reason the Committee recommends that Respondent be suspended from the practice of law for thirty (30) days, that as a condition of reinstatement before she resumes the

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continue to work and cooperate with the practice monitor during the six month probation period, during which the monitor shall report to the Board and Bar Counsel after the third and sixth month. If Respondent fails to cooperate with the practice monitor during the period of suspension, she will be required to demonstrate fitness as a condition of reinstatement pursuant to D.C. Bar Rule XI, § 16, and any failure to cooperate during the probationary period will be deemed to be a violation of her probation.

practice of law she cooperates with a practice monitor selected by the Board on Professional Responsibility, and that upon reinstatement she be placed on probation for an additional period of six months subject to the same terms and conditions as in *Edwards I,* during which time she will continue to work with the practice monitor who will report regularly to the Board on Professional Responsibility. The failure to cooperate with the practice monitor or a violation of the terms of her probation shall subject Respondent to revocation of probation and the imposition of an additional 30-days suspension.

Respectfully submitted

HEARING COMMITTEE NUMBER TWO

/s/ Michael F. Hertz

Michael F. Hertz, Ad Hoc Chair

/s/ Paula B. McKann

Paula B. McKann

/s/ Bradford M. Barry, Esq.

Bradford M. Barry, Esq.

DATE: JUL - 5 2006

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

In the Matter of	:	
	:	
LUCY R. EDWARDS,	:	Bar Docket No. 488-02
	:	
Respondent.	:	
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 197020)	:	

REPORT AND RECOMMENDATION OF
THE BOARD ON PROFESSIONAL
RESPONSIBILITY

This matter involves a will which Lucy Edwards ("Respondent") lost, or misplaced, for four years. After a one-day evidentiary hearing, Hearing Committee Number Two ("Committee")

found that Respondent violated Rules 1.15 (a) ("Safekeeping Property") and 1.1 (b) ("skill and care") and recommended that Respondent be suspended for thirty-days, that as a condition of reinstatement before she resumes the practice of law she cooperates with a practice monitor selected by the Board on Professional Responsibility ("Board") and that upon reinstatement she be placed on probation for an additional period of six months. Respondent recently completed a six month suspension with conditions including cooperation with a practice monitor. *In re Edwards,* 870 A.2d 90 (D.C. 2005). Both Respondent and Bar Counsel filed exceptions to the Committee's Report. For the reasons set forth

below, the Board sustains the Committee's finding of a violation of Rule 1.1(b), but believes that there was a failure of proof as to a Rule 1.15(a) violation. The Board agrees with Bar Counsel that a violation of Rule 8.4(d) has been proven. We recommend a thirty-day suspension, but do not believe that either fitness, or any probation period or other condition, is appropriate.

I. Procedural History

Bar Counsel served Respondent with the Specification of Charges and Petition Instituting Formal Disciplinary Proceedings on January 21, 2005. Respondent was granted two extensions of time for filing her answer, which was then filed on time on March 31, 2005, *pro se*. Following a

postponement of the hearing due to illness of one of Bar Counsel's witnesses, the hearing took place November 1, 2005. Respondent was represented by counsel at the hearing and subsequently.

Bar Counsel called as witnesses the Complainant (Shirley Dickerson-Fairley, daughter of the deceased and sole legatee under his will), Evan J. Krame, Esq. (Accepted by the Committee without objection as an expert on wills, estates, and probate), and Respondent. Respondent also testified on her own behalf. In rebuttal, Bar Counsel recalled the Complainant, and Respondent called Clementine Ruffin (a companion of the decedent) in surrebuttal. Bar Counsel's exhibits ("BX") were admitted without objection at the

hearing, and a supplemental exhibit (a probate pamphlet published by the Superior Court) was admitted over objection, post-hearing.

At the conclusion of the hearing, the Committee made a preliminary, nonbinding determination that Respondent had violated at least one Rule of Professional Conduct, and Bar Counsel introduced the two D.C. Court of Appeals opinions *In re Edwards,* 808 A.2d 476 (D.C. 2002) and 870 A.2d 90 (D.C. 2005), as evidence in aggravation. Bar Counsel submitted proposed findings of fact and conclusions of law, Respondent filed a post-hearing brief, and Bar Counsel filed a reply brief. The Committee issued its Report and Recommendation on July 5, 2006. Both parties

excepted to portions of the Committee's Report. Respondent filed a brief with the Board on August 14, 2006. Bar Counsel filed a brief and Respondent filed a reply. Bar Counsel also filed a motion to hold in abeyance the scheduled oral argument to await the report and recommendation of Hearing Committee Number One which recently received evidence in a separate and distinct disciplinary prosecution of Respondent. Respondent opposed the granting of the motion and, on September 20, 2006, the Board denied Bar Counsel's motion. The Board heard oral argument on October 5, 2006.

II. Finding of Fact

Respondent takes exception to certain factual findings of the Committee, *e.g.*, whether

Respondent continually searched for the Will from 1998 until 2002, but does not challenge any specific factual findings. Bar Counsel offers a counter statement of facts that, by and large, supports the Committee's factual findings. Committee findings of fact will be affirmed when supported by "substantial evidence on the record, viewed as a whole." Board R. 13.7; *In re Micheel,* 610 A.2d 231, 234 (D.C. 1992). We, of course, owe no deference to the Committee's determinations of "ultimate facts," such as whether the facts establish a violation of a Rule, and other conclusions of law. *Micheel,* 610 A.2d at 234; *In re Appler,* 669 A.2d 731, 739 (D.C. 1995).

We find that the Committee's findings of fact

are amply supported by the record, and have adopted them with minor revisions. Pursuant to Board Rule 13.7, we have made one or two additional findings to provide context and further support for our conclusions.

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by examination on March 5, 1965, and subsequently assigned Bar number 197020. BX A; Tr. at 122-23.

2. In June 1994, Respondent was retained by William David Dickerson ("Mr. Dickerson"), who had two living children, to draft his Last Will and Testament (the "Will"). Tr. at 125-26. Mr. Dickerson paid Respondent $100 for this service.

By the terms of Mr. Dickerson's Will, Shirley Dickerson-Fairley, Ph.D., his daughter and the Complainant, was designated as the sole beneficiary of his estate. BX 4 at 1-2.

3. Mr. Dickerson's Will also named Respondent as the personal representative of his estate. Tr. at 127-28. At Mr. Dickerson's request, Respondent maintained the original Will at her law office, then located at 1424 K Street, N.W., Washington, D.C. 20005. BX 4 at 2; Tr. at 127-30.

4. Respondent's normal practice was to place the original of a will (such as Mr. Dickerson's) in her file cabinet. Tr. at 133. However, she typically did not retain the originals of wills she drafted. Tr. at 159-61. Respondent kept her client's files in

eight to ten file cabinets that were fireproof, but not necessarily waterproof, and in eight to ten boxes. Tr. at 143-44.

5. In August 1996, Respondent moved her law office from 1424 K Street, N.W., to 33103 Georgia Avenue, N.W., Washington, D.C. 20010. BX 4 at 2, n.1; Tr. at 134-35.

6. On October 13, 1998, when Mr. Dickerson died, he was a widower but lived with a companion. Soon thereafter, Respondent was advised of his death by Mr. Dickerson's companion. BX 4 at 3-4.

7. At the time of his death, Mr. Dickerson owned his own residence on Benning Road, N.E., where he had lived since the 1940s. Tr. at 17-18.

8. Following her father's death, Dickerson-Fairley (the "Complainant") obtained a copy of her father's Will. Tr. at 18-19; BX 2C.

9. Because she did not locate the original Will in her father's home and after noticing that Respondent was nominated in her father's Will to serve as the personal representative of his estate, Complainant attempted to contact Respondent at her K Street, N.W., office. Complainant testified that no one answered the telephone. Tr. at 21. Thereafter, Complainant succeeded in contacting Respondent and made an appointment to meet with her. After Respondent failed to appear for their first appointment, the two either met or talked in late 1998 or early 1999. Tr. at 21-23.

Complainant recalls meeting with Respondent at a location near Georgia Avenue and Columbia Road (Tr. at 27-28), which corresponds closely to where Respondent had her office in the late Fall of 1998. Tr. at 136. Complainant was able to identify Respondent at the disciplinary hearing in November 2005. Tr. at 25-26. Respondent recalls speaking with Complainant, but not necessarily meeting with her at that time. Tr. at 145. The Committee believed that it was not necessary for it to resolve whether the ensuing discussion was in person or over the telephone, and the Board agrees.

10. In their discussion, Complainant advised Respondent that she had drafted her father's Will, which Respondent recalled, and that Respondent

had been named as personal representative in the Will and retained the original copy of the Will, neither of which Respondent initially recalled. Tr. at 60-61, 63-64, 145, 155, 157. Respondent does not believe that she received a copy of the Will from Complainant at that time. Tr. at 156. Respondent indicated that she would look for Mr. Dickerson's original will and would telephone Complainant after she found it. Tr. at 22-23. During this first discussion, Respondent expressed some concern about her ability to locate the original Will because of a flood she had had at her office. Tr. at 61, 140; BX 4 at 3. Complainant received no calls from Respondent after this conference. Tr. at 22-23.

11. Although Respondent testified that, independent of the actual file, she normally would have had "some records" that would indicate that she maintained an original will, she conceded that she had none that showed that she had retained this Will. Tr. at 133-34, 162-63. Also, at that time, Respondent did not keep a record of where different files may have been located in her office. Tr. at 217.

12. Between 1999 and 2002, Complainant was living at times away from her home in Silver Spring, Maryland, because her home had been declared unfit for habitation following a flood. Tr. at 23-24. For about one year, apparently sometime between the latter part of 2000 and 2002, she lived

in Memphis, Tennessee. Tr. at 25, 39. Complainant testified that, after she had her initial meeting or discussion with Respondent, she continued to attempt to contact Respondent but was unable to locate and reach Respondent, claiming that Ms. Edward' telephone was unlisted or out of service. Tr. at 34-34, BX 2A. It appears that at least some of the attempts to reach Respondent about which Complainant testified were at Respondent's former K Street address at a time after Complainant already knew and, according to her testimony, had already met with Respondent at 3103 Georgia Avenue, N.W. Tr. at 27, 66-67.

13. Respondent testified that her telephone

number was listed and her service was not suspended (Tr. At 176-77) and that the District of Columbia Bar also listed her telephone number. Tr. at 177. Aside from Complainant's testimony, there was no evidence that Respondent's business telephone was ever disconnected or unlisted.

14. It was not clear to the Committee why Complainant, who, according to her testimony, had once contacted and visited Respondent's office, would have been unable to find Respondent again either by telephone or during one of Complainant's visits to Washington, D.C. Accordingly, despite Bar Counsel's invitation to conclude otherwise, the Committee found Complainant's description of her efforts to contact Respondent unclear (Tr. at 34-40,

66-67) and thus failed to find clear and convincing evidence that Complainant made numerous significant attempts to recontact Respondent between 1999-2002. The Board has reviewed the relevant portions of the record and believes that the Committee is correct in its conclusion.

15. The Committee concluded that it had no reason to doubt Respondent's testimony that she did not recall that she had retained the original Will (Tr. at 164), or that in the period immediately following her discussion with Complainant in late 1998 or early 1999, she had searched for but could not locate Mr. Dickerson's last Will. Tr. at 145-56, 180-81. Nonetheless, and notwithstanding Respondent's testimony to the contrary (Tr. at 146-

47, 220), the Committee was unable to conclude that Respondent continued to search for the Will after that initial period. The Board has again reviewed the relevant portions of the record and believes that the Committee is correct in its conclusion.

16. At no point after her discussion in late 1998 or early 1999 with Complainant, through at least September 2002, did Respondent attempt to recontact Complainant to apprise her of the results of whatever searches she had made for the Will. Respondent did not inform Complainant that the Will could not be found or take any other action in connection with the Will. Tr. at 206-07.

17. In mid-2002, Complainant learned that

Respondent was renting office space from a friend of Complainant, who provided her with Respondent's then-current office address. Tr. at 28-29.

In a letter dated September 24, 2002, Complainant wrote to Respondent, reminding her of their earlier meeting regarding Mr. Dickerson's Will and the need to locate the original so it could be filed with the Probate Court. BX 2A. In her letter, Complainant did not receive a response by October 1, she would forward a copy of the letter to the D.C. Bar Association. *Id.* at 2. Respondent received this letter and renewed her effort to locate Mr. Dickerson's last Will. Tr. at 148-49.

18. By late October, when she had heard

nothing from Respondent, Complainant filed a complaint with Bar Counsel alleging that Respondent had failed to probate her late father's Will. BX 1. Bar Counsel received the complaint on October 23, 2002 (BX 1), and then by letter of November 25, 2002, notified Respondent of the complaint against her. BX 3.

19. Following receipt of Complainant's letter, Respondent realized that she and her staff needed to "make some additional effort to try to find the Will." Tr. 148. Some time prior to November 4, 2002, Respondent personally located Mr. Dickerson's last Will (Tr. at 149; BX 2B) and notified Complainant. Tr. at 30. Respondent testified that she located the Will in the probate

section of her files. Tr. at 149, 168-69. Although the Committee made no factual finding on this, Bar Counsel does not contest her testimony on where the Will was located. Bar Counsel's Brief at 9,¶15. It was in a file cabinet and had not been damaged by water. Tr. at 149, 169. Arguably by Respondent's admission, it was found in the file where it was expected to be. Tr. at 218-19. At that time, Respondent did not keep a file index of the location of different files. Tr. At 217.

20. Following receipt of the telephone message from Respondent that the Will had been located, probably in early November, Complainant called Respondent's office and was told that she could meet Respondent in December. Tr. at 30; BX 2B.

On November 8, 2002, Complainant wrote and requested that Respondent send her the Will. BX 2B; Tr. at 30. Complainant also requested Respondent's "withdrawal from any participation in the handling" of the Will. BX 2B.

21. Approximately one week later, Complainant went to Respondent's office and obtained her father's Will, along with Respondent's renouncement of her appointment as personal representative of Mr. Dickerson's estate. She thereafter "took it to the Probate Court and filed it . . . ." Tr. at 32.

22. As of the date of the Hearing in this matter, Complainant had still not caused to be filed a petition to probate the estate of her father. Tr. at

43.

III. Analysis

The Committee found that Respondent violated Rule 1.15(a) ("Safekeeping Property"), and Rule 1.1(b) ("skill and care"), but that Bar Counsel had not carried its burden of proof as to Rules 1.3(b)(1) ("intentionally" failing to seek lawful objective of client), and 8.4(d) (interfering with administration of justice). Bar Counsel abandoned the allegation of violation of Rule 8.4(b) (committing a criminal act) after the hearing "[i]n light of the testimony and evidence presented . . . " Bar Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction, filed December 5, 2005, n.1. Bar Counsel also dropped its pursuit of

a Rule 1.3(b)(1) violation on its appeal to the Board.

Before the Board, Bar Counsel argued that Respondent violated Rules 1.15(a), 1.1(b), and 8.4(d), while Respondent continued to maintain that no violation had been proven. The Board is in agreement with the Committee on Respondent's lack of skill and care (Rule 1.1(b)) but does not believe that a violation of Rule 1.15(a) has been proven. We agree with Bar Counsel, however, that a violation of Rule 8.4(d) occurred.

A. Rule 1.15(a)

Rule 1.15 is entitled "Safekeeping Property." The Rule describes a lawyer's duties with respect to holding the property of a client and other

persons. It sets forth in detail the requirements for holding funds and then goes on to require that "[o]ther property shall be identified as such and appropriately safeguarded." Comment 1 provides that "[a] lawyer should hold property of others with the care required of a professional fiduciary."

The great majority of disciplinary matters under Rule 1.15 have involved commingling and misappropriation cases to those involving the safekeeping of clients' and others' valuables and keeping appropriate records. Thus, in *In re Lenoir*, Bar Docket Nos. 053-86, *et al.* (BPR March 21, 1990), *aff'd* 585 A.2d 771 (D.C. 1991) (per curiam), where a lawyer was given a will to probate and five checks made out to the decedent but failed to

deposit the checks and misplaced them in an unrelated file, the Board found a violation of then Rule DR 9-103(B)(2), the predecessor of current Rule 1.15(a). The Board noted that "[t]he checks were obviously 'property of a client,' and respondent clearly failed to put them in a 'place of safekeeping as soon as practicable.'" *Id.* At 779. The magnitude of the respondent's failure in *Lenoir*, however, was well beyond that in the instant proceeding. In *Lenoir*, five checks which should have been deposited in a bank account were, instead, placed by the respondent in an unrelated file and forgotten. At the time at which he was given the checks, respondent was also retained to commence the probate and attend to

other estate matters. He did none of these things. Respondent herein placed the Will in her probate files contained in fireproof file cabinets (Tr. 133) and, as such, it was held in "safekeeping." It was appropriately filed and maintained. We are not ready to say that all attorneys must keep separate lists identifying each of their documents on file. The fault with Respondent appears to be more in the level of her search for the Will when notified of the death of Mr. Dickerson. The Will was there in the probate file all the time, and was finally located by Respondent herself when she was faced with a possible complaint to the Bar Counsel. Tr. 148-49.

Evan J. Krame, Esq., accepted by the

Committee, without objection by Respondent, as an expert in probate matters, testified that wills should be "protected from the elements and easily identified . . . . The average practice would be [to] catalog whatever original documents one has in his possession, keep a list of them, keep them in an organized fashion, usually in alphabetical order." Tr. at 74. Mr. Krame initially testified that the misplacing of a will violated the duty of care to safekeep property (Tr. at 111, 113), but ultimately somewhat amended his view:

> Because misplacing a document of this nature entails several levels of mistakes, because these documents are typically cataloged, I keep an index of them, I know where they are supposed to be located, merely misplacing it, alone, may not rise to the level of being a breach of

> one's fiduciary duty or ethical obligation, but the inability to find it, would rise to that level, because I would have a record somewhere, telling me that I've got this will, and if I can't find it where I think it's supposed to be, there's only so many boxes or so many filing cabinets where I should be looking to find it.

Tr. at 118.

The Board agrees with the Committee that subsumed within the concept of safekeeping the valuable property of a client or others is the ability to locate that property so it can be timely used for the benefit of or on behalf of the client or for another person for whom the property is held. We note that Rule 1.15(b) provides that "a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third

person is entitled to receive . . . ." At a minimum that means that upon being informed by the Will's sole legatee, to whom Respondent had a fiduciary responsibility (Tr. at 116), that Respondent was the named personal representative and had possession of the original of Mr. Dickerson's Will, Respondent had a duty to locate the Will.

Here, we believe that the Will could have been timely located had Respondent conducted a proper search. The best evidence of this is the fact that years later, and after the threat of disciplinary proceedings, the Will was found, and, according to Respondent's testimony, found in that section of the files in which it should have been located, albeit having slipped down between other files. Tr.

at 218. The problem here is that the original search was not sufficiently thorough. It does not appear that Respondent drafted so many wills, the originals of which she was asked to retain in her files (Tr. At 159-61), or that the probate section of her files was so extensive (Tr. At 219-20), that any delay in locating Mr. Dickerson's Will should have resulted. Respondent recalled that she had prepared his Will and, although she did not recall retaining the original, she certainly had to know that she had a file with a copy of the Will. Tr. at 125-28.

We also note that Respondent was designated in the Will as personal representative and had been advised of this when told of Mr. Dickerson's

death. Tr. at 60-61, 157. She therefore had an additional reason to locate the Will promptly and, unless instructed otherwise by the family, file a petition in probate. Tr. at 77, 85. If she could not locate the Will promptly, Respondent had a duty to so advise the Probate Court and the beneficiary and seek to have a copy designated as the Will for probate. Tr. at 86. However, this does not violate Rule 1.15(a). Here the Respondent did safeguard the Will (the only client property in her custody). It was not irresponsibly dropped in some box (which might not be "safe-keeping"), but placed in a cabinet with other probate files. Respondent's error was not in her manner of storing the Will, but in failing to search diligently enough to locate

it. That falls under a different ethical rule, in our opinion. Therefore, the Board finds that no violation of Rule 1.15(a) has been proven.

B. Rule 1.1(b)

Rule 1.1(b) requires a lawyer to "serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." Comment 5 observes, among other things, that "[c]ompetent handling of a particular matter includes . . . use of methods and procedures meeting the standards of competent practitioners." Further, there should be "continuing attention to the needs of the representation to assure that there is no neglect of such needs." D.C. R. Prof. Con. 1.1(b) Cmt 5.

Respondent's inability to locate the Will and assure that the original or a copy was filed was an abandonment of her client's interest, which conduct is not legal representation consistent with the skill and care required by Rule 1.1(b) (*In re Lewis*, 689 A.2d 561 (D.C. 1997)), and is "dropping of the ball" in a legal matter. *In re Summer*, 665 A.2d 986, 989 (D.C. 1995).

Respondent contends that, because her only client was Mr. Dickerson, and she properly drafted and maintained his Will, "undamaged and separate from her own property in a fireproof file cabinet," she fulfilled all of her duties. Respondent's Brief at 10. She asserts she had no client relationship with the beneficiary - the

Complainant - and owed her no duties. This is clearly incorrect. Respondent agreed to draft Mr. Dickerson's Will and to serve as his personal representative in probating the estate at his death. BX 2C; Tr. at 137-38. The original Will was left in her safekeeping for that purpose. In probate, the personal representative serves in a fiduciary capacity to the estate and its beneficiaries. Tr. 116. Even though the Will made no mention of fees to cover the personal representative's work, D.C. Code § 20-751, applicable to estates of decedents who died on or after July 1, 1995, provides for "reasonable compensation" of the personal representative. *See also* Tr. at 102-05. Respondent may not simply abandon her duty as

personal representative unless relieved of it. Tr. At 100-01. The testimony from both Complainant and Respondent was that, when informed in late 1998 or early 1999 that Mr. Dickerson had died, Respondent was reminded that she was the personal representative. Tr. At 157-58. It was only in 2002, after four years of inaction, that Respondent withdrew as personal representative. Tr. At 31, 226.

We conclude that Respondent violated Rule 1.1(b) by her failure to serve the estate of Mr. Dickerson, which included the sole beneficiary, with the skill and care commensurate with that generally afforded to clients by other lawyers in similar matters. These minimal standards flow

not only form common sense but also from a lawyer's training and experience in the probate field, and represent the methods and procedures that comprise competent practice. Tr. At 110-11. When the failure to utilize such methods and procedures leads to the abandonment of a client's interest or the dropping of the ball, Rule 1.1(b) has been violated.

Here, Respondent recalled neither that Mr. Dickerson's Will named her as his personal representative nor that she retained a copy of the original Will. When informed of both matters shortly after her client's death in late 1998, she was unable to locate the Will form that point until October or November 2002. Although she had in

fact retained the Will, Respondent neglected to establish or utilize a system by which she could easily determine that she had her former client's Will and that she was the personal representative. Accordingly, the original Will was not available to be filed with the Probate Court by either Respondent or someone else. Further, as personal representative Respondent had a duty to either locate the Will or take steps to have a copy filed and declared the operative Will, unless she was relieved of that responsibility. Bar Counsel has carried its burden of proof on Rule 1.1(b).

C. Rule 1.3(b)(1)

Rule 1.3(b)(1) provides that "[a] lawyer shall not intentionally fail to seek the lawful objectives of a

client through reasonably available means permitted by law and the disciplinary rules." Bar Counsel has withdrawn this count and we find that the record lacks clear and convincing evidence to sustain it.[1]

D. Rule 8.4(d)

Rule 8.4(d) provides that it is professional misconduct for a lawyer to "engage in conduct that seriously interferes with the administration of justice." To find a violation of this disciplinary rule, the Court applies three criteria: (1) "the conduct must be improper," (2) "the conduct itself

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[1] Bar Counsel also abandoned its pursuit of a Rule 8.4(b) violation after the evidentiary hearing. We find that the record lacks clear and convincing evidence to support that charge.

must bear directly upon the judicial process (i.e., the 'administration of justice') with respect to an identifiable case or tribunal," and, finally, (3) the conduct must "at least potentially impact upon the process to a serious and adverse degree." *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996). *See also In re Mason*, 736 A.2d 1019, 1023 (D.C. 1999) (the court was interpreting the ethical rule that applied to attorney conduct prior to January 1, 1991). We accept that "an attorney's improper conduct can be prejudicial to the administration of justice not only by bearing directly on the judicial decision-making function, but also by bearing directly on the judicial process in general." *Hopkins*, 677 A.2d at 60.

Bar Counsel argues that Respondent's conduct had an adverse impact on the judicial process in tha, pursuant to D.C. Code § 18-111 and as the nominated personal representative, Respondent was required to deliver Mr. Dickerson's Will to the Probate Court or the Register of Wills upon learning of his death and begin the probate of his estate. By losing, or misplacing the Will, Respondent prevented the timely opening of the estate. Further, by failing to safekeep her client's Will and retrieve it in a timely manner, Respondent allegedly frustrated the probate process to the detriment of her client's heir. All of this taken together, constitutes a violation of Rule 8.4(d), as argued by Bar Counsel.

We agree with Bar Counsel that Respondent violated Rule 8.4(d). Although the Committee agreed that the derelictions of a personal representative can be prejudicial to the administration of justice, because there were no arrangements to compensate Respondent for her probate services, and because she had no Will to probate (she could not locate it), the Committee did not find any serious and adverse effect on the judicial process. HC Rpt. At 16-17.[2] Respondent

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[2]The Committee also found no violation of D.C. § 18-111, inasmuch as one can comply with that provision by delivering a Will to "an executor" and Respondent was an executor (a personal representative is an executor; *see* Tr. at 112).

> Whoever, having possession of a testamentary instrument, willfully neglects, for the period of 90 days after the death of the testator becomes

agreed with her client, when she drafted his Will, to serve as the personal representative of his estate at his death - and placed that language in the final Will. "I am clear [from the original meeting with Mr. Dickerson] . . . that he wanted me to be his personal representative." Tr. at 128. Although the Will had no provision on fees to cover the personal representative's work, she would have been compensated pursuant to the laws of the District of

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> known to him, to deliver it to the Probate Court, or to the Register of Wills, or to an executor named in the instrument, shall be fined not more than $500.

We see no need to enter into an analysis of Respondent's conduct vis-a vis this law, since we have concluded she had an obligation under Rule 1.1(b) ("skill and care") to locate and file the Will, as personal representative. *See Lenoir*, 585 A.2d at 778 n.3; Tr. at 91-92.

Columbia. D.C. Code § 20-751 provides for "reasonable compensation" to the personal representative for her services. This amendment to the Probate Law applied to any "estates of decedents who died after its effective date of July 1, 1995." *In re fair*, 780 A.2d 1106, 1111 n. 12 (D.C. 2001). Mr. Dickerson died in 1998. Once Respondent had filed the Will and petitioned the Court to be appointed as personal representative, (§ 20-302 and Tr. at 76, 106), her fees would be covered without waiting for prior court approval. § 20-753, Tr. at 103. *See also In re Fair*, 780 A.2d at 1111.

As to the Committee's concern that Respondent had no Will to probate - it was lost - so there could

be no adverse impact on the probate process, we have already concluded that Respondent had a duty to locate the Will in her probate file. Her failure to mount a thorough search until threatened with Bar Counsel action hardly lessens the impact of her conduct on the judicial process. All his property passed directly to Respondent, as the personal representative nominated in Mr. Dickerson's Will, upon his death - to be held for "administration and distribution of the estate." D.C. Code § 20-105. Although the Will needed to be filed with the Probate Court and Respondent appointed as personal representative for property to be transferred, (Tr. at 79), Respondent had a duty to either locate the original and proceed with

probate or cause a copy to be filed and declared tthe operable Will. Tr. at 86. Her failure to take these steps had more than a "*de minimis*" effect on the judicial process. *Hopkins*, 677 A.2d at 61. "In the District of Columbia, legal title to real property (alike with personal property) passes not directly to the heirs or devisees, as at common law, but rather to the personal representative of the decedent's estate . . . [T]herefore, appointment of a personal representative is a prerequisite to probate and distribution . . ." *Douglas v. Lyles*, 841 A.2d 1, 3 (D.C. 2004). As the person nominated in Mr. Dickerson's Will to act as personal representative, Respondent had a clear duty to locate the Will, file it with the Court, and be appointed personal

representative, or seek to withdraw as personal representative designate. D.C. Code § 20-302; Tr. at 108.

A Rule 8.4(d) violation does not require an actual "interference with judicial decision making ..." So long as the acts had "the potential to do so," that is enough. *In re Unchendu*, 812 A.2d 933, 941 (D.C. 2002). The probate process could not begin until Respondent located and filed the Will; her negligence in not locating and filing the Will as the designated personal representative, or initiating the process to have it declared lost, tainted he probate process "in more than a *de minimis* way." *Hopkins,* 677 A.2d at 61. The Fact that Complainant possessed a copy of her father's Will

does not ease the impact of respondent's failure. It is "a very difficult thing" to establish the loss of an original will in the Probate Court. Tr. at 86(Evan. J. Krame, expert witness). "To establish a lost will, there is a very high standard of proof." *Id.* When Complainant attempted to file her copy with the Probate Court, she testified that she was unsuccessful. "I took it [my copy] to the court and they would not accept it. They told me I had to have the original." Tr. at 232.

Respondent's conduct did not impact on an ongoing probate proceeding, but on the probate process. Her failure to locate the Will and initiate the probate process interfered with the "judicial process" with respect to an identifiable "tribunal" -

the Superior Court's Probate Division. *Hopkins,* 677 A.2d at 61. The Probate Law within the District of Columbia establishes the means for an orderly administration of estate law including the transfer of assets. D.C. Code § 18-111 specifically recognizes the need to require the filing of testamentary instruments within 90 days of the death of a testator in order to expeditiously conduct property transfers and the like. *See also when someone dies . . .* General information for Heirs and Legatees in D.C., published by the Superior Court. BX14. (A listing of the steps to be taken following a testator's death, for probate of the estate, e.g., settlement of claims on the estate, payment of any taxes, any transfer of assets to

Legatees.) The failure by an attorney to locate and file a will, when she is the designated personal representative and possesses the original, can - and under these facts did -seriously impact the probate process. *See, e.g., In re Cleaver-Bascombe*, (BPR Dec. 17, 2004), remanded on other grounds, 892 A.2d 396 (D.C. 2006) (The submission of a false CJA voucher in a case that had already been concluded, may not have affected an identifiable case or court action, but it nevertheless affected the "CJA program". "[C]onduct that impacts on the CJA program bears upon the judicial processes of the appointing court [the court that appoints lawyers under the CJA program.]"). Board Report at 23.

Clearly, there was no evidence in the instant proceeding of willful conduct by Respondent vis-a-vis the probate of Mr. Dickerson's Will, nor evidence of any affirmative conduct by her to taint the judicial process as in a purposeful refusal by an attorney to avoid responding to investigative demands from the Office of Bar Counsel - conduct which underlies many Rule 8.4(d) charges. *In re Artis,* 883 A.2d 85 (D.C. 2005); *In re Cater,* 887 A.2d 1 (D.C. 2005). However, evidence of willfulness or specific intent is not a requirement underlying proof of Rule 8.4 (d). *In re Hopkins,* 677 A.2d 55 (D.C. 1996). remains our primary guide under this disciplinary rule. It involved an attorney and her representation of a personal

representative in the handling of an estate somewhat as herein. There, respondent had knowledge that the personal representative was withdrawing funds form the estate without permission, but took no affirmative steps in court to freeze the assets - believing that the Register of Wills would act. Reviewing the Board's finding of no violation of DR 1-102 (A)(5) (predecessor to 8.4(d)), the Court held that "knowing failure to obey a specific court procedure" is not a required proof for this disciplinary rule. *Hopkins,* 677 A.2d at 59. Rather "the attorney must either take improper action or fail to take action when, under the circumstances, he or she should act." *id.* at 61.

An attorney's conduct may be improper and fall

under Rule 8.4(d) because the attorney "should know that he or she would reasonably be expected to act in such a way as to avert any serious interference with the administration of justice." *Id.* In the instant proceeding. Respondent knew that she was expected to act as personal representative on her client's death, and take prompt steps to probate his Will and distribute his assets. Her fialure to initiate these steps caused, or had the potential to cause, a delay for several years in the transfer of assets, including real property, thereby, meeting the third criterion of *Hopkins,* "taint the judicial process in more than a *de minimis* way." *Id. See In re Shepherd*, 870 A.2d 67 (D.C. 2005) (an attorney's negligent acts in

representing a client in her suit against the District of Columbia were held to violate several disciplinary rules including 8.4(d)). The respondent argued that his failure to attend a pretrial conference was due to a misunderstanding in that another attorney was to handle the conference. Therefore, his conduct was not willful. Noting that his negligent act had caused the case to be dismissed, leading to an appeal and reinstatement, the Board concluded that his acts "tainted the process in a more than *de minimis* way." *In re Shepherd,* Bar Docket Nos. 313-98 & 83-99 at 17 (BPR Dec. 10, 2003). Responding to the argument that respondent had no notice that his substitute counsel would fail to appear, the

Board noted that he had failed to get his client's consent to the transfer, and had not followed up to insure that other counsel had appeared in his stead. *Id.* at 22.

We distinguish the facts of this case and its more than *de minimis* impact on the judicial process from the facts in *In re Hallmark*, 831 A.2d 366 (D.C. 2003). The respondent there committed errors in submission of her CHA vouchers, causing the Superior Court to deny her request for payment. Contrasting her negligent act to Rule 8.4(d) decisions involving "intentional disregard for the effect that an action may have on judicial proceedings," the Court concluded that the respondent's "untimely submission of an obviously

deficient voucher did not seriously and adversely affect the administration of justice, or her client." 831 A.2d at 375. Respondent herein neglected her duty to her deceased client and his heir and, as a result, adversely impacted the probate process in the District of Columbia. Unlike in *Hallmark*, we cannot conclude that the potential impact was *de minimis*. We also do not read *Hallmark* as altering the standards set forth in *Hopkins* for finding a Rule 8.4(d) violation, i.e., requireing evidence of intent. We dealt with this same question in *In re Shepherd*, Bar Docket Nos. 313-98 & 83-99 at 23 (BPR Dec. 10, 2003), *aff'd*, 870 A.2d 6, (D.C. 2005), and concluded that negligent conduct can also run afoul of Rule 8.4(d). As recognized in *Hopkins*,

there is no knowledge or scienter requirement for this Rule. 677 A.2d at 59-60.

We find that Bar Counsel has proven a violation of Rule 8.4(d) by clear and convincing evidence.

IV. Sanction Recommendation

The Committee found two rule violations (1.1(b) and 1.15(a)) and recommended that Respondent be suspended from the practice of law for thirty days, that as a condition of reinstatement before she resumes the practice of law she cooperates with a practice monitor selected by the Board and that upon reinstatement she be placed on probation for an additional period of six months. HC Rpt. At 25. Respondent has asked us to reject any sanction, consistent with her position that no violation of the

ethical rules has been proven. Bar Counsel supports the sanction recommended by the Committee.

The appropriate sanction is what is necessary to protect the public and the courts, to maintain the integrity of the profession, and "to deter other attorneys form engaging in similar misconduct." *Unhendu*, 812 A.2d at 941 (internal citations omitted). Recognizing that each case must be evaluated on its facts, the sanction imposed must be consistent with cases involving comparable misconduct. D.C. Bar R. XI, § 9(g)(1); *In re Duniet*, 687 A.2d 206, 211(D.C. 1996).

A. Length of Suspension

In determining the appropriate sanction, the

Board considers the seriousness of the misconduct, sanctions for similar misconduct, prior discipline, prejudice to the client, violation of other disciplinary rules, whether the conduct involved dishonesty, the respondent's attitude, and circumstances in aggravation and/or mitigation. *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc).

1. Seriousness of Misconduct and Sanctions for Similar Misconduct

"The range of sanctions for cases involving neglect extends from public censure to disbarment. Where in that range the sanction is set depends on a number of factors, including the number of violations, whether the violations include

intentional failures, whether they include dishonesty, the respondent's disciplinary history and the respondent's appreciation of and attempts to rectify his misconduct." *See In re Mance,* Bar Docket No. 031-01 at 26 (BPR July 23, 2004).

We have found violations of Rules 1.1(b) and 8.4(d) for failing to exercise the skill and care expected of an attorney who has been retained to prepare one's will, retain the original, and serve as personal representative when notified of the death of her client. Although an attorney may misplace an important document in his or her file, as happened here, the rules on professional conduct require a higher level of care in filing such documents, in the seriousness of the search for the

missing documents, and the duty to advise the client (or beneficiary in this case) if the document is truly lost and what steps are recommended to cure the defect, i.e., filing appropriate papers in court to have a cop of the Will certified for probate as the original. This duty of skill and care (Rule 1.1(b)) requires more than a peremptory search with nothing further. Certainly, it is carelessness and negligence to mount a serious search (that uncovers the Will) only when the beneficiary has threatened to report one to the Bar authorities - some four years later. We are not recommending any specific rules for the indexing of a lawyer's important files; that would be beyond our clairvoyance. Each attorney can devise his or her

own filing system so long as it is effective in guarding against the type of occurrence that happened here, and take appropriate steps to correct any shortcomings in his or her system when they become apparent.

B. Prejudice to the Client

"[P]rejudice to the client is not an element of a charge of neglect, although the existence *vel non* of prejudice to the client may be relevant on the issue of sanction." *In re Banks,* 461 A.2d 1038, 1041 (D.C. 1983). The obvious prejudice in this case, as a result of Respondent's failure to locate Mr. Dickerson's original Will and to carry through as personal representative, was that the Will was unavailable to be probated for four years. As a

practical matter, this affected principally the legal transfer of Mr. Dickerson's home to his daughter his sole legatee and the Complainant in this case. While Complainant testified as to some expenses incurred because she could not transfer the house (Tr. at 42-43), the Committee and the Board were less than impressed with her efforts to reconnect with Respondent after their initial conversation in late 1998 or early 1999, to fine out what was going on in connection with her father's Will. We again note that, as of the date of the hearing in this matter, the Complainant had still not had the Will probated or the house transferred. Tr. at 235-39.

C. Conduct Involving Dishonesty or Misrepresentation

As Bar Counsel conceded, Respondent has not been charged with engaging in dishonest conduct. Bar Counsel's Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction filed December 5, 2005, at 23.

D. Prior Discipline

Respondent has a record of prior discipline and began serving a six-month suspension, with conditions, stemmed from her negligent misappropriation of a client's funds in June 1996. *Id.; Edwards,* 808 A.2d 476. In the 2002 opinion, while rejecting the claim of misappropriation with respect to another client, the Court did note that Respondent's failure to deposit that client's funds may have violated her obligation to safeguard

client property pursuant to Rule 1.15(a). *Id.* at 480; BX 13(b) at 13-14.

E. Respondent's Acknowledgment of the Misconduct

As noted by the Committee, this was a contested proceeding. Respondent has not acknowledge any misconduct, before either the Committee or the Board. As observed by the Board recently, "failure to acknowledge any wrongful conduct - or even errors in judgment - is troubling." *In re Evans*, 902 A.2d 56, 76(D.C. 2006).

F. Mitigating Factors

Respondent testified that she now keeps an index of important documents. Tr. at 217.

G. Sanction

The Committee recommended a suspension of thirty days and that upon reinstatement Respondent be place on probation for an additional period of six months. If Respondent had not had a prior record of discipline, the Committee might well have recommended public censure. The Board agrees. *See Shepherd,* 870 A.2d 67 (public censure for several rule violations, including 8.4(d), in failing to appear at a pretrial conference and related acts; only prior discipline was an informal admonition); *In re Bland.* 714 A.2d 787 (D.C. 1998) (public censure imposed for neglect of a client's matter: the respondent possessing an unblemished record); *In re Clower,* 831 A.2d 1030 (D.C. 2003) (public censure imposed for not

fulfilling recordkeeping obligations with respect to a client's settlement funds and not making prompt payment). But see *In re Shorter,* 707 A.2d 1305 (D.C. 1998) (public censure for several rule violations, including 8.4(d) and 1.1(a) ("competence") for leaving grand jury transcripts with his client in violation of a court order and failing to prepare for two pro bono trails; with record of prior discipline).

Respondent does not possess an unblemished record. *See Edwards,* 808 A.2d at 478. (The misappropriation stemmed from Respondent's handling of clients' funds. Additionally, she became aware that Bar Counsel was questioning her conduct in 1996 · two years prior to

Respondent's misconduct being questioned herein.). As recognized by the Court in *In re Dory,* 552 A.2ddddd 518, 520 (D.C. 1989), the "first principle" in considering an appropriate sanction is whether the respondent has an "unblemished" record. It "weighs heavily in favor of imposing . . . the lightest sanction that will serve the purpose of Bar discipline," quoting *In re Reback,* 513 A.2d 226, 233 (D.C. 1986) (en banc). We do not have that option here. Furthermore, Respondent shows no acknowledgment of, or remorse for, her misconduct.

In connection with her prior disciplinary proceeding, Respondent testified "that her mishandling of client funds [in 1996] was a product

of confusion and disorganization within her office." *In re Edwards*, 870 A.2d at 93. Respondent's inability to locate Mr. Dickerson's Will in 1998 or 1999 was a product of confusion and disorganization that apparently still existed within Respondent's office (although the Will was drafted and presumably placed in her files in 1994). Respondent's inability to locate Mr. Dickerson's Will meant that she was unable to serve his interests and those of his beneficiary with the appropriate skill and care required of a lawyer practicing in this field. Clearly, Respondent knew that she had prepared the Will and, if she could not recall whether she had the original, she surely knew that she should have a copy in her file. Tr. at

125-28.

In light of Respondent's prior disciplinary record and her lack of acknowledgment of any misconduct, we believe that a thirty-day suspension is in order. *See In re Bingham*, 881 A.2d 619 (D.C.2005) (public censure followed by three-year probation for inattention in handling of an estate, even with an unblemished record); and *Dory*, 552 A.2d 518 (thirty-day suspension for neglect of an estate - petition filed and allowed to sit for three years; evidence of prior discipline).

The Board does not believe that a probationary period is required in this case. We diverge form the Committee and Bar Counsel in this regard. Inasmuch as Respondent has recently completed a

six-month suspension with a practice monitor, covering office procedures, it would not seem necessary to continue that practice. The events at issue here occurred in 1998-2002, long before the recent suspension and use of a practice monitor by Respondent. We therefore believe that a thirty-day suspension is sufficient.

Bar Counsel also requests that a requirement to demonstrate fitness prior to returning to the practice of law be imposed. Bar Counsel's Brief filed September 5, 2006, at 34. The Committee recommended a fitness requirement only as a condition of violation of the probation that it recommended. The Court of Appeals has recently made clear that the imposition of a fitness

requirement is "an appropriate response to serious concerns about whether the attorney will act ethically and competently in the future, after the period of suspension has run." *Cater*, 887 A.2d at 22. The Court explained that its "concern is that [the attorney's] 'resumption of the practice of law will not be detrimental to the integrity and standing of the Bar, or to the administration of justice, or subversive to the public interest.'" *Id.* (quoting *In re Steel*, 630 A.2d 196, 201 (D.C. 1993)).

To serve that purpose, the Court held that "the most appropriate standard is whether there exists a 'serious doubt' of a respondent's fitness to practice law. This means . . . that to justify

conditioning the reinstatement of a suspended attorney on proof of rehabilitation, the record in the disciplinary proceeding must contain clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law." *Id.* at 24. The Court also noted that, while a fitness requirement is not as severe as disbarment, it comes close (*id.* at 25), and that there should be reluctance to impose it if the need is not amply demonstrated, as it "may have the practical effect of greatly prolonging . . . a respondent's period of suspension." *Id.* at 23 (quoting *Edwards*, 870 A.2d at 97). We do not believe that Bar Counsel has met its burden to show by clear and convincing evidence that Respondent is not fit to practice law

in the District of Columbia. While we have expressed serious concerns about Respondent's office procedures and filing and recordkeeping system, as well as her care in seeing that the family and Probate Court of her search for the missing Will, we cannot say that those deficiencies rise to the level of creating serious doubt about Respondent's fitness to practice law. Further, as noted by the Committee, to impose a fitness condition in this case in conjunction with the thirty-day suspension we have recommended would have the practical effect of greatly multiplying the effective period of suspension.

V. Conclusion

For the foregoing reason, the Board recommends that Respondent be suspended from the practice of law for thirty (30) days.

BOARD ON PROFESSIONAL RESPONSIBILITY

By: /s/ Ray S. Boze
Ray S. Boze

All members of the Board concur in the Report and Recommendation except Mr. Nathan, who is recused and Ms. Coghill-Howard, who did not participate.

Dated: DEC 18 2006

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE NUMBER ONE

In the Matter of	:	
	:	
LUCY R. EDWARDS,	:	Bar Docket No. 397-96
	:	
Respondent.	:	
	:	
A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 197020)	:	

REPORT AND RECOMMENDATION OF HEARING COMMITTEE ONE

Bar Counsel has charged Respondent with eight separate violations the District of Columbia Rules of Professional Conduct (the "Rules") and the Rules of the District of Columbia Court of Appeals Governing the Bar ("D.C. Bar Rules"). Bar Counsel

categorized these charges under two counts.

Under Count 1, the Hearing Committee finds that Bar Counsel proved by clear and convincing evidence that Respondent violated Rule 1.15(a) (for Misappropriating her client's funds); another portion of Rule 1.15(a) and D.C. Bar Rule XI, § 19(f) (for not maintaining complete financial records); Rule 1.15(b) (for failing to deliver to her client money he was entitled to receive); and Rule 1.16(d) (for failing to surrender property to which her client was entitled). The Committee finds that Bar Counsel failed to prove that Respondent violated Rule 1.4(a), which requires attorneys to keep their clients reasonably informed about the status of pending matters.

Under Count II, the Committee finds that Bar Counsel proved by clear and convincing evidence that Respondent violated Rule 8.1 (b) (for failing to respond to a lawful demand for information from a disciplinary authority) and D.C. Bar Rule XI § 2(b)(3) (for Failing to comply with an order of the District of Columbia Court of Appeals Board on Professional Responsibility). The Committee finds that Bar Counsel failed to prove that Respondent violated Rule 8.4(d), which prohibits attorneys from engaging in conduct that seriously interferes with the administration of justice.

For the reasons discussed in Part IV, because the Committee finds that Respondent has intentionally misappropriate her client's funds, the

Committee recommends that Respondent be disbarred.

I. PROCEDURAL BACKGROUND

This case arises out of Respondent's representation of a client in a bankruptcy matter beginning in March 1994 and encompassing events taking place up until mid-1997.

As described in more detail in Part II, Bar Counsel initially filed a Petition Instituting Formal Proceedings and a Specification of Charges in this matter on March 12, 1997. On May 19, 1997, Bar Counsel filed a Motion to Dismiss Without Prejudice, which the Board granted on May 27, 1997.

Bar Counsel submitted the Petition and

Specification of Charges now before the Committee on October 21, 2005, and it was docketed on October 25, 2005[1], Respondent filed an Answer on May 11, 2006, admitting many of the facts asserted

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[1] The Committee asked the parties to explain why proceedings are being held in this matter ten years after the relevant events, because it might be relevant to aggravation or mitigation if sanctions were appropriate. May 23, 2006 Hearing Transcript ("Tr.") at 309. In its post-hearing brief, Bar Counsel advises that much of the delay stemmed from (1) Respondent's failure to provide an initial response to her client's complaint in 1996 (which in part forms the basis of the Count II charges here); (2) a 1998 motion filed by Respondent to quash a Bar Counsel subpoena to produce financial records, which was not resolved until October2001; (3) a motion for reconsideration filed by Respondent after her motion to quash was denied; and (4) Respondent 's failure to answer the current specification of charges until six months after it was due. Bar Counsel's Proposed Recommendation of Fact, Conclusions of Law, and Recommendation as to Sanction ("Bar Br.") at 13. Respondent disagrees with Bar Counsel's assessment of the reason for the delay. The Committee address this argument in Part IV *infra*.

by Bar Counsel but denying all of the charges.

An evidentiary hearing took place on May 23, 2006. Respondent was present and represented by counsel. Assistant Bar Counsel called two witnesses: Respondent and her client, Mark R. Green. Bar Counsel moved to introduce Bar Exhibits ("BX") 1 through 18 and 25, 26, and 30, which were admitted without objection. May 23, 2006 Hearing Transcript ("Tr.") at 304, 312. During Respondent's case, Respondent moved to introduce Respondent's Exhibits ("BX") A, B, C, and D, which were admitted without objection. Tr. 295-97; 307-08. No witnesses were presented by the Respondent because both Respondent and Mr. Green - the only witnesses considered material by

the Respondent - had already testified at length during Bar Counsel's case-in-chief. Tr. at 295.

At the end of the hearing, the Committee made a preliminary, nonbinding determination that Bar Counsel had sustained its burden, under the clear and convincing evidence standard, that Responded had committed some of the charged violations and the Committee requested briefing from the parties on all of the charges. Tr. at 306. Respondent then testified on her behalf during a mitigation phase of the hearing. Tr. At 315-33.

Bar Counsel submitted to the Committee a Proposed Findings of Fact, Conclusions of Law, and Recommenda- tions as to Sanction ("Bar Br.") on June 26, 2006, and Respondent submitted a

Proposed Findings of Fact and Conclusions of Law ("Resp't Br.") on July 17, 2006. Bar Counsel submitted a Reply Brief on August 2, 2006.

II. PROPOSED FINDINGS OF FACT

1. Respondent is a member of the Bar of the District of Columbia Court of Appeals, having been admitted by examination on March 4, 1965, and subsequently assigned Bar number 197020. BX A; Tr. at 69-70. In 1994, she moved her practice to 1424 K. Street N.W. in the District of Columbia. Tr. at 74.

Retention of Respondent by Mark Green

2. On March 7, 1994, Mark R. Green, then a resident of the District of Columbia, met Respondent and retained her to assist him in filing

for bankruptcy to protect his condominium, located at 1736 Willard St., N.W., from foreclosure after he fell behind in making mortgage and condominium fee payments. BX 2 at 5; Tr. at 75, 186-90, 233. A foreclosure sale had been scheduled for two days later, on March 9, 1994. BX 9 at 28. Mr. Green agreed to pay a flat $1,000 fee for Respondent to prepare the bankruptcy filing, attend a meeting with his creditors, and secure an order form the bankruptcy court confirming Mr. Green's payment plan. BX 2 at 5. He also agreed to pay a $160 filing fee. Tr. at 96. Mr. Green paid $700 of his fee that day. BX 9 at 33; Tr. at 96, 102. The retainer agreement also indicated that Mr. Green would pay Respondent $150 per hour for any further

work required in his case. BX 2 at 5.[2]

3. On March 9, 1994, Respondent filed a voluntary bankruptcy petition on behalf of Mr. Green, with an attached list of creditors and statement of attorney compensation, in the U.S. Bankruptcy Court for the District of Columbia (the "Bankruptcy Court"). BX 17 at 133; BX 18 at 136-

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[2] The retainer form Respondent used was not one she normally used with a bankruptcy client, but the time-sensitive situation required a form that could be completed quickly. Tr. At 75. Mr. Green testified at the hearing that the "first order of business was to save the condo, and so we never discussed any fees other than the original retainer" and that he had never "really read [the] lines" on the retainer agreement specifying that Respondent's $2,000 fee covered only the initial bankruptcy filing, creditors meeting, and confirmation. Tr. at 196-97, 255. Mr. Green testified that he knew he was obligated to pay for Respondent's additional work and tha tthe retainer agreement clearly specified a $150-per-hour rate for that additional work. BX 9 at 31;Tr. 199, 256.

38.

4. Mr. Green had three creditors: GE. Capital Mortgage Services, Inc. ("G.E. Capital"), which held the first trust on Mr. Green's condominium amounting to about $45,000; a second trust holder to which Mr. Green owed about $8,000, and his condominium association, which held a secured debt of about $7,500. BX 9at 28.

5. On March 21, 1994, Respondent sent Mr. Green an invoice indicating that he was required to pay the remaining $460 of his initial retainer and filing fee. BX 2 at 4.

6. On April 6, 1994, Respondent filed Mr. Green's various schedules, a statement of financial affairs, and Chapter 13 plan. BX 17 at 133.

7. On April 9, 1994, Mr. Green paid Respondent the remaining $460 of his initial retainer and filing fee. BX 9 at 33; Tr. At 96, 102.

8. On June 3, 1994, the Bankruptcy Court entered an order confirming Mr. Green's Chapter 13 plan. BX 18 at 139. Respondent thus achieved Mr. Green's objective of preventing foreclosure on his condominium.

Respondent's Post-Bankruptcy Confirmation Representation of Mr. Green

9. On August 18, 1994, G.E. Capital filed a motion for relief from the automatic bankruptcy stay because it had not received payments form Mr. Green pursuant to the bankruptcy plan. BX 17 at 134; BX 18 at 162. Subsequently, Respondent

consulted with Mr. Green, reviewed records, and successfully negotiated a consent decree that gave Mr. Green an opportunity to catch up on his post-petition arrears (delinquent payments that had accumulated since the bankruptcy filing). BX 9 at 29.

10. On September 14, 1994, the Bankruptcy Court entered a consent order denying G.E. Capital's motion for relief from the stay after the parties had reached their agreement. BX 18 at 162-63. The order provided that Mr. Green would cure the arrears by paying $1,180 to G.E. Capital that day and by making extra payments until December 1, 1994. Id. Mr. Green provided Respondent with a $1,180 cashier's check, which

Respondent forwarded to G.E. Capital's attorney on September 14, 1994. BX 18 at 160-61. That same day, Respondent sent a letter to Mr. Green informing him that she had forwarded his check and reminding him about his new payment responsibilities. Id. at 160.

11. On January 19, 1995, G.E. Capital filed an affidavit of breach notifying the Bankruptcy Court that Mr. Green had failed to make payments that the consent order's new payment schedule required and that Mr. Green needed to pay $4,860.68 to cure the breach. BX 17 at 134; BX 18 at 165-68. G.E. Capital sent copies of the affidavit to both Mr. Green and Respondent. BX 18 at 168.

12. On March 17, 1995, the Bankruptcy Court

entered an order granting G.E. Capital relief form the bankruptcy stay because Mr. Green had failed to cure the breach. G.E. Capital was thus allowed to foreclose on Mr. Green's condominium. BX 18 at 170-72, 175-77.

13. On March 21, 1995, Respondent spoke with Mr. Green about a proposed forbearance agreement she might be able to negotiate with G.E. Capital to keep it from taking action against Mr. Green's property. Tr. 114-17. Mr. Green testified that he told her he thought he could come up with at least $5,000 as part of that effort. Tr. 114-17. Respondent provided similar testimony, though she recalled that the amount was between $3,000 and $5,000 and that this amount would include

some payment of attorney's fees. Tr. 140-41.

14. On April 10, 1995 Respondent faxed the attorney representing G.E. Capital a proposed forbearance agreement dated March 29, 1995 under which Mr. Green would pay $3,000 immediately and then make additional payments until he cured his outstanding arrears by, at the latest, the end of February 1996. BX 18 at 181-82; BX 9 at 29.

15. During the spring and summer of 1995, Respondent and Mr. Green discussed the possibility of reducing his bankruptcy payments form $330 per month, as the bankruptcy plan required, to $100. BX 9 at 30. The bankruptcy plan, however, was never modified. Id.

May 17, 1995 Check from Mr. Green to Respondent

16. A critical fact in this case involves the characterization of a $2,000 check drafted by Mr. Green payable to Respondent, dated May 17, 1995. BX 12 at 2.

17. On May 16, 1995, Respondent spoke with Mr. Green by telephone about his need to produce some money to satisfy Mr. Green's outstanding debts. Mr. Green indicated that he would bring in $2,000 the next day and $5000 altogether. BX 9 at 34.

18. On May 17, 1995, Mr. Green brought a cashier's check in the amount of $2,000 to Respondent's office. BX 12 at 39; Tr. at 193-95.

Respondent was at her office when Mr. Green arrived with the check. Tr. at 192. It is not clear whether Mr. Green gave the check directly to Respondent or to one of Respondent's staff members, but Respondent was at least in the office when Mr. Green brought the check in and, in any event, became aware that Mr. Green had brought the money into the office. BX 9 at 31-32; Tr. At 195.

19. According to Mr. Green, Mr. Green brought the $2,000 in for Respondent to hold on his behalf and use to try to forestall the foreclosure procedures on his condominium or to settle the arrears on his mortgage payments. Tr. at 195, 274-76; BX 9 at 31. Mr. Green testified that he,

Respondent, and Respondent's then- office manager, Walter Johnson, agreed that the money would go into an escrow account. Tr. at 195. Mr. Green does not recall receiving any receipts showing that Respondent had received the funds and what she was going to do with it. Id.

20. Respondent's testimony on this event differs in one critical respect. Respondent testified that this money was to be used in part to address Mr. Green's outstanding debts with his three creditors, but also would be used to pay some of his outstanding attorneys's fees.

21. Although Respondent appears to have had a legitimate basis to seek additional attorney's fees from her client, her action were inconsistent with

the notion that any part of the $2,000.00 was for payment of an attorney's fee.

22. On May 19, 1995, Respondent deposited Mr. Green's check in to her attorney trust account. On that day, respondent also deposited two checks, one for $4,000 and the other for $400, provided by her client Capitol Bus Rental, Inc, ("Capitol Bus") into the trust account. BX 14 at 57-59. Respondent indicated on the $4,000 Capitol Bus Check's memo line that the money would be used to make an IRS payment on the company's behalf. BX 14 at 59. Simultaneously, Respondent withdrew $1,400 in cash form the $6,400 deposit, leaving a net deposit of $5,000, which brought her trust account balance to $5,336.77. BX 14 at 55,

57. Respondent did not note on the deposit ticket the reason for the $41,500 withdrawal or whose money it represented, but she testified that she took it out of Mr. Green's check as attorney's fees. BX 14 at 57; Tr. 125.

On that day, Respondent also deposited two checks, one for $4,000 and the other for $400, provided by her client Capitol Bus Rental, Inc. ("Capitol Bus")· into the trust account. BX 14 at 57-59. Respondent indicated on the $4,000 Capitol Bus check's memo line that the money would be used to make an IRS payment on the company's behalf. BX 14 at 59. Simultaneously, Respondent withdrew $1,400 in cash from the $6,400 deposit, leaving a net deposit of $5,000, which brought her

trust account balance to 5,336.77. BX 14 at 55m 57. Respondent did not note on the deposit ticket the reason for the 1,400 withdrawal or whose money It represented, but she testified that she took it out of Mr. Green's check as attorney's fees. BX 14 at 57; Tr, 125.

23. On May 20, 1995, Respondent wrote a check drawn on her escrow account for $5,016.77 payable to the IRS on which she wrote "Tax payment for Capitol Bus Rental." BX 14 at 69. Respondent does not have any records to explain how Respondent was able to sent a check for this amount to the IRS on behalf of Capitol Bus when she had received only $4,000 for the purpose the day before. Tr. 128-32. Respondent testified that

a company representative provided sufficient additional money at some point, but none of the deposits immediately before she wrote the $5,015.77 Check nor any up to a month after the IRS cashed it show that any additional money on behalf of Capitol Bus entered her escrow account. Tr. 128-38.

24. On May 24, 1995, Respondent deposited a $2,100 Insurance settlement check made payable to another client into her escrow account, as well as a $4,000 check payable to herself and drawn against her operating account at Industrial Bank of Washington. BX 14 at 61. On the $4,000 check, Respondent wrote "Bal. Atty's fee,"but she did not indicate whose fees that sum represented Id.; Tr.

at 148. Simultaneously, Respondent withdrew $1,000 from the $6,100 total deposit, leaving a net deposit of $5,100, which brought her escrow account balance to $410,436.77. BX 14 at 55. Respondent did not note on the deposit ticket the reason for the $1,000 withdrawal or whose money it represented. BX 14 at 61.

25. Respondent wrote several checks against her escrow account that, by June 7, 1995, left a balance of $1,489,13. BX 14 at 55. Additional disbursements left the escrow account with overdraft balances of -$11.30 on June 19, 1995 and -$36.30 on June 21, 1995. BX 15 at 81. On June 21, 1995, Respondent deposited $50 into her account, bringing the balance to $13.70. BX at 81,

87. On June 26, 1995, the balance rose to $913.70, then dropped to $712.68 by July 10, BX 15 at 81, BX 16 at 109. Thus, from June 7, 1995 until July 10, 1995, Respondent's escrow account balance remained under $2,000 - less than the amount Mr. Green had brought to her office on May 17, 1995 to be held on his behalf.

26. Mr. Green subsequently requested $1,000 back from the $2,000 he had brought to Respondent's office to cover some pressing expenses, including the cost of recovering his car from an impound lot and of moving to New York City for graduate school. Tr. at 212. He spoke with Mr. Johnson about obtaining the $1,000. Id.

27. On July 19, 1995, Respondent's escrow

balance stood at $712.68. BX 16 at 109. That day she deposited 1,000 in cash into the escrow account and then gave Mr. Green a check made out to him for $1,000 that included the notation, "Return of funds from escrow." BX 16 at 113, 125; Tr. at 150-51. The record thus indicates that respondent took steps to ensure that she could pay Mr. Green from funds in the trust account. Mr. Green picked the check up at the office and cashed the check that day, leaving the escrow account balance at $712.68 - less than the remaining $1,000 to be held on Mr. Green's behalf. BX 16 at 109; Tr. at 152-53, 270. The balance rose to $1,397.68 on July 24, but dropped to $397.61 on July 27,1995, and it remained below $1,000 until August 7, 1995. BX

16 at 109. Respondent does not have any invoices or documents indicating that she had returned the $1,000 to Mr. Green. Tr. At 159. Mr. Green never requested a refund of the remaining $1,000. Tr. 262, 269.

28. In July 1995, Mr. Green moved from Washington, D.C. to an apartment in the SoHo neighborhood of New York City. Tr. 222. After moving, Mr. Green had a management company manage his Willard Street condominium. Tr. 278-79. A tenant who began living there in July or August paid about $600 or $700 in rent each month directly to the management company, but Mr. Green does not remember what the company did with the rent money. Id. At some point, Mr.

Green moved to Union, New Jersey, but he does not recall for sure if that was in 1996 or 1997. Id. He also does not remember if he told Respondent about his move, but recalls that Respondent could and did contact him by calling the number to his parent's house in Scotch Plains, New Jersey. Id. At 224. The most reliable contact information for Mr. Green after leaving Washington was his parents' Scotch Plains address and phone number. Id. at 264. At least up until he left Washington, Mr. Green was satisfied with the communications he had with respondent. Id. at 266.

29. On August 17, 1995, an attorney representing Mr. Green's condominium association wrote to Respondent, informing her that Mr. Green

had not paid his monthly assessments that year and owed $1,584. RX B; BX 18 at 184. The attorney wrote that if the association did not receive payment by September 1, 1995, it would request relief from the bankruptcy court. Id.

30. In October 1995, Mr. Green provided various financial data to G.E. Capital as part of a "workout package"that Respondent had attempted to negotiate, in lieu of foreclosure on Mr. Green's condominium, during the summer of 1995. BX 9 at 29.

31. On October 4, 1995, the Chapter 13 bankruptcy trustee filed a report with the Bankruptcy Court on claims pending against Mr. Green. BX 17 at 134.

32. On October 6, 1995, Mr. Green wrote to Mr. Johnson in Respondent's office, opining that the $330 bankruptcy deductions from his payroll were excessive and that he should negotiate a reduction to the $100 per month that he and Respondent had discussed previously. RXD; Tr, 242-43.

33. In January 1996, Respondent and Mr. Green spoke briefly by telephone after Respondent had left a message with his roommate at his New York City apartment. Tr. 218; BX 30.

34. On February 12, 1996, the Chapter 13 bankruptcy trustee filed a report with the Bankruptcy Court on claims pending against Mr. Green.

35. In the Spring of 1996, Respondent learned

that Mr. Green's condominium had gone into foreclosure, and she subsequently contacted his creditors to see if anything could be done. BX 9 at 31, Respondent's office did not receive any notice of the foreclosure from Mr. Green's creditors. Id.

36. On June 17, 1996, Mr. Green wrote Respondent at her 1424 K Street N.W. office to inquire about the status of his condominium because he had received notice that it had gone into foreclosure, and he asked Respondent why she had not notified him, given that she had "$3,900 of my money in trust." BX 2 at 3.[3]

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[3] At the hearing, Mr. Green testified that he had provided Respondent, in addition to the $2,000 cashier's check on May 7, 1995, two additional checks. Tr. at 202. However, during Bar Counsel's

He also asked about his bankruptcy status. Id.

37. In August 1996, Respondent moved her offices from 1424 K Street to 3103 Georgia Avenue N.W., and during the move she lost Mr. Green's June 17, 1996 letter to her. BX 9 at 27. Respondent never answered the letter. Tr. at 204-05.

38. On August 30, 1996, Mr. Green wrote to Bar Counsel to complain that Respondent had not responded to his June 17, 1996 letter. BX 1. He explained that he learned from a management

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investigation, he indicated that he had given Respondent only one other check. BX12. There is no evidence supporting this testimony and the Committee finds that Mr. Green provided only 2,000.00 to Respondent.

company that his condominium had gone into foreclosure and that the money he provided to her "in trust" was meant for her to monitor and advise him on his matter. Id.

39. On October 2, 1996, Bar Counsel sent Respondent a letter addressed to her Georgia Avenue office notifying her of Mr. Green's complaint and informing her that Bar Counsel had decided to investigate it. BX 3; Tr. At 79-80. Bar Counsel attached Mr. Green's complaint and requested a response by October 14, 1996. BX 3.

40. On October 11, 1996, the Chapter 13 trustee filed a motion to dismiss Mr. Green's bankruptcy case because he was in material default of his plan payments and because he failed

to notify the trustee of the name and address of his then employer. BX 18 at 188-99.

41. On October 21, 1996, Bar Counsel sent Respondent another letter of inquiry because Respondent had not responded to the October 2 letter. BX 4; Tr. at 80. Bar Counsel demanded a written response to Mr. Green's allegations by October 26, 1996. BX 4.

42. On November 1, 1996, Respondent left Bar Counsel a recorded message concerning her need to respond to its letters of inquiry. BX 5.

43. On November 4, 1996, based on the trustee's motion to dismiss, the Bankruptcy Court ordered that Mr. Green's bankruptcy case be dismissed with prejudice; Respondent was sent a

copy of this order. BX at 186.

44. On November 5, 1996, Respondent advised a law clerk for the Office of Bar Counsel that she would respond to Bar Counsel's letters and Mr. Green's allegations. BX 5.

45. On November 12, 1996, Respondent met with Assistant Bar Counsel, who told her that he would move to compel a written response if she did not submit one soon. BX 5.

46. On December 5, 1996, the bankruptcy court issued another order to close the case, which Respondent received. Tr. at 163. At this point, Respondent considered her representation of Mr. Green to have ended. Id.

47. On December 20, 1996, Respondent faxed

a letter to Assistant Bar Counsel seeking an extension because she had been dealing various health problems, including migraine headaches, glaucoma, a sinus infection, and the flu, and because she was struggling to meet client obligations after moving offices and becoming a solo practitioner. BX 5; BX (b) at 23; Tr. at 83. Respondent informed Assistant Bar Counsel that she would contact him before Christmas to reschedule the Green case and two others also pending with Bar Counsel. BX (b) at 23.

49. On December 24, 1996, Respondent appeared at the Office of Bar Counsel seeking to meet with Assistant Bar Counsel, who was unavailable. BX 5. Respondent left without

providing her written response. Id.

50. On January 3 and 6, 1997, a law clerk for the Office of Bar Counsel phoned Respondent concerning her lack of written response and told her that Bar Counsel would move the Board to issue an order compelling her to provide one if she did not do so by January 9, 1997. BX 5. Respondent promised to do so, but she did not. Id.

51. On February 12, 1997, the Board ordered Respondent to respond to Bar Counsel's letters and Mr. Green's allegations within ten days.

52. On February 12, 1997, the Board ordered Respondent to respond to Bar Counsel's letter and Mr. Green's allegations within ten days.

53. On February 14, 1997, a copy of the Board's

order was hand-delivered to Respondent. BX 6(a) at 14.

54. On March 12, 1997, Bar Counsel obtained approval of a petition and specification of charges alleging that Respondent violated Rule 8.4(d) and D.C. Bar Rule XI, § 2(b)(3) based on Respondent's failure to comply with the Board's order. BX 6(a) at 13-15.

55. On April 11, 1997, Respondent's attorney wrote to the Hearing Committee assigned to the case to request additional time to review evidence and prepare an answer to the charges and to request that a hearing set for April 29, 1997 be postponed for thirty days. BX 8.

56. On April 30, 1997, Respondent - without

the assistance of separate counsel - finally responded to the Bar Counsel's letters of inquiry and to Mr. Green's allegations. BX 9. Respondent summarized the work she had done on behalf of Mr. Green and included a "Statement" dated May 7, 1997, detailing work she had done for him between March 1994 and April 1996. Id.[4] Although Respondent believes she did much more work than was reflected on the May 7, 1997 Statement, which she and her husband prepared, she has not been able to locate any invoices we may have sent to Mr.

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[4] Curiously, although the Respondent's letter to Bar Counsel was dated April 30, the Statement was dated May 7. Respondent admitted in her April 30 letter that the May 7, 1997 Statement had not been sent to Mr. Green Id.

Green asking for payment for this additional work. Tr. at 96-99. Mr. Green testified that he received no statements since he received the March 21, 1994 statement requesting payment of the remaining $460 of his initial retainer fee. Tr. 207-08; see also Tr. 284. The May 7, 1997 Statement also does not include an entry reflecting the $1000 Respondent refunded to Mr. Green on July 19, 1995. BX 9 at 34; Tr. 158.

57. The April 30, 1997 letter represented Respondent's best memory of her representation for Mr. Green a that time. Respondent contends, however, that the lettre was not a perfectly accurate summary because Respondent's office manager was not available to help prepare it. Tr.

at 88.

58. On May 12, 1997, through her attorney, Respondent provided an answer to the Specification of Charges. BX(b) at 20-23. Respondent explained that, during her August 1996 move, she did not receive Bar Counsel's inquiry letters promptly because she did not immediately notify the D.C. Bar of her new office address; that, after her move, she operated without staff support and had difficulty retrieving records and files; that Mr. Green's file and her bank records could not be found for some time; and that she had been dealing with health issues. Id.

59. On May 19, 1997, Bar Counsel filed a Motion to Dismiss the Petition and Specification of

Charges Without Prejudice, having received responses from Respondent that would permit an investigation. BX 7.

60. On May 27, 1997, the Board issued an order granting Bar Counsel's Motion to Dismiss without prejudice. BX 7.

III. CONCLUSIONS OF LAW

Based on these facts, Bar Counsel charged Respondent with eight violations. One set of charges relates to Respondent's actions during her representation of Mr. Green, and the other relates to her actions after Bar Counsel informed her that it was opening an investigation. The Committee addresses each of these in turn.

B. Count I Charges: Respondent's

Representation of Mr. Green

These charges allege that Respondent:

(1) Misappropriated a portion of the $2,000 that Mr. Green gave Respondent in violation of Rule 1.15(a);

(2) Failed to deliver the rest of those funds to him and render a full accounting upon his request in violation of Rule 1.15(b);

(3) Failed to take timely steps to surrender the remainder of those funds to him after her representation of him ended in violation of Rule 1.16(d);

(4) Failed to maintain and preserve for five years complete financial records demonstrating how she handled Mr. Green's funds in violation

of Rule 1.15(a) and D.C. Bar Rule XI § 19(f); and

(5) Failed to keep Mr. Green reasonably informed about the status of his bankruptcy matter in violation of 1.14(a).

The Committee notes that the first three charges relate to Respondent's alleged mismanagement of her client's funds. Before it can examine those charges, the Committee must first address a threshold question: whether the $2,000 Mr. Green gave Respondent belonged to him or to Respondent. The Committee concludes that the $2,000 (and then the remaining $1,000) were client funds.

At. The hearing, Respondent testified that Mr. Green brought the $2,000 check in to her on May

17, 1995 at least in part to cover past and future attorney's fees. Tr. At 140-42.

There is substantial record evidence, however, that Respondent believed that the $2,000 were Mr. Green's funds, to be held on his behalf as part of negotiations with his creditors. In Respondent's 1997 letter to Bar Counsel, which represented the first substantive response to Mr. Green's allegations in this matter and Respondent's best recollection of her representation of him at the time, she wrote:

> "Mr. Green brought funds into the office in May 1995 to attempt to settle or secure a forbearance for the arrears on his mortgage.... In July 1995, Mr. Green requested and received back $41,000 of the money. After considering the amounts owed for services and review of

> his case, Mr. Green is entitled to a refund."

BX 9 at 31-32. Respondent now claims that her memory was hazy when writing this response and that, having recently managed to speak with Mr. Johnson about Mr. Green's representation, she was reminded that Mr. Green had urgently requested that she continue representing him and that he paid attorney's fees in May 1995. Tr. 168-71. She also was reminded that Mr. Green would usually indicate the specific purpose for which he intended his money to be used, and, because Mr. Green's $2,000 cashier's check did not reflect any such purpose, she concluded that the money was meant to cover attorney's fees. Tr. at 172. The

Committee does not find the Respondent's 2006 testimony on this threshold issue to be credible.

Even if the Committee were inclined to give more weight to Respondent's 2006 memory versus her 1997 memory, there is substantial, independent evidence indicating that Respondent viewed the $2,000 as Mr. Green's money. First, she deposited Mr. Green's check into her escrow account, not her operating account. BX 14 at 57-59.[5] She did not provide Mr. Green any type of receipt crediting him for paying attorney's fees, and the May 7, 1997 statement summarizing the

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[5] Respondent testified that depositing Mr. Green's Funds into her escrow account was a mistake. Tr. at 154.

services she provided Mr. Green did not indicate any payment of attorney's fees. Tr at 156-58. Moreover, prior to his delivering the money, Respondent had not sent him any invoices requesting payment for services beyond the one in 1994 requiring payment of the remainder of his initial retainer fee. Tr. at 96-99.

Just two months after delivering the money, Respondent promptly gave $1,000 back to Mr. Green when he asked for it, writing a check drawn on her escrow account and marking the check as "Return of funds from escrow" when, if she believed she was lending him her own money, she could have simply given him cash or a personal check. Tr. at 155. That she also deposited $1,000 of

personal funds into her escrow account that day to cover the $1,000 check from her escrow account is also telling. The evidence fully supports the conclusion that Respondent knew that these funds were Mr. Green's property. BX 16 at 113, 125; Tr. at 150-51.

Mr. Green himself testified that he brought the money in to be held on his behalf and used as part of negotiations with his creditors, an he said that Respondent and Mr, Johnson had discussed this plan and were in agreement on it. Tr. at 195, 274-76. Mr. Green, however, was not particularly credible witness and the Committee has based its findings and conclusions on the record of deposits and disbursements from Respondent's trust

account and not on Mr. Green's testimony. Mr. Green, who could not keep his payment commitments under agreements negotiated by Respondent and overstated the funds that he had provided to Respondent in his Bar Complaint, was not a credible witness and therefore all findings of the Committee that do not adopt Respondent's testimony are based only on Respondent's trust account records.

Having concluded that the $2,000 belonged to Mr. Green, requiring it to be held in trust by Respondent, the Committee turns to the individual charges in this Count, finding that Bar Counsel proved by clear and convincing evidence that Respondent violated Rules 1.15(a), 1.15(b), 1.16(d),

and D.C. Bar Rule XI § 19(f), but not that she violated Rule 1.4(a).

1. Rule 1.15(a): Misappropriation of Client Funds

Rule 1.15(a) states, in relevant part, that a lawyer shall hold property of clients ... that is in the lawyer's possession in connection with a representation separate from the lawyer's own property"and that such funds "shall be kept in a separate account maintained in a financial institution." Dist. of Columbia Rules of Prof l Conduct R. 1.15(a). The District of Columbia Court of Appeals has repeatedly held that misappropriation includes any unauthorized use of a client's funds entrusted to his or her lawyer,

including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he or she derives any personal gain or benefit. See, e.g., In re Carlson, 802 A.2d 341, 347-48 (D.C. 2002); In re Anderson, 778 A.2d 330, 335 (D.C. 2001) (citing In re Harrison, 461 A.2d 1034, 1036 (D.C. 1983)); In re Berryman, 764 A.2d 760, 768 (D.C. 2000); In re Travers, 764 A.2d 242, 249-50 (D.C. 2000); In re Pels, 653A,2d 388m 383-94 (D.C. 1995). In addition, misappropriation occurs whenever the balance in the attorney's escrow account falls below the amount due to the client, regardless of whether the attorney acted with an improper intent; it is essentially a *per se* offense. See Smith 817 A.2d 196, 202 (D.C. 2003);

Carlson; 802 A.2d at 348; Anderson, 778 A.2d at 335; Berryman, 764 A.2d at 768.

The record of Respondent's escrow account balances during June and July 1995 indicates that she misappropriate Mr. Green's money. After depositing his $2,000 cashier's check into her escrow account on May 19, Respondent made a number of other deposits and simultaneous cash withdrawals that left her escrow account balance at $10,436.77 on May 24, BX 14 at 55. She then wrote a series of checks that left the account balance at $41,489.13 on June 7, at -$11.30 on June 19, at -$36.30 on June 21, at $913.70 on June 26, and then never higher than $913.70 by the time Mr. Green arrived at Respondent's office to

get $1,000 back on July 19. BX 14 at 55; BX 15 at 81; BX 16 at 109. Thus, from June 7 until July 19, Respondent's escrow account balance remained below the $2,000 Mr. Green had given her to hold in trust. Additionally, after Respondent returned $1,000 to Mr. Green, her escrow account initially remained below the remaining $1,000 of his money she was required to hold in trust, rose above $1,000 for three days in late July, and then dropped below $1,000 from July 27 until at least August 7 (the last balance date included in the record). BX 16 at 109. By allowing her escrow account balance to drop below the amounts she owed him, there is no question that Respondent misappropriated Mr. Green's money.

The important question for sanctions purposes, however, is whether Respondent's misappropriation resulted from mere negligence on her part, or whether she acted intentionally or recklessly, for on virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted form nothing more than simply negligence." See A Anderson, 778 A.2d at 335 (quoting In re Addams, 579 A.2d 190, 191 (D.C.1990)); See also Pels, 653 A.2d at 396; In re Micheel, 610 A.2d 231, 233 (D.C. 1992)); In re Midlen, 8885 A,2d 1280, 1288 (D.C. 2005) (noting that disbarment is almost invariably"required if the attorney acts intentionally or recklessly in

misappropriating client funds). In determining whether a misappropriation involves more than just negligence, the "central issue... is how the attorney handles entrusted funds, whether in a way that suggests the unauthorized use was inadvertent or the result of simple negligence, or in a way that reveals either an intent to treat the funds as the attorney's own or a conscious indifference to the consequences of his [or her] behavior for the security of funds." Carlson, 802 A.2d at 348 (quoting Anderson, 778 A.2d at 339); see also Midlen, 885 A.2d at 1288 (D.C. 2005). A court can make an inference of dishonest misappropriation when bank records establish that a lawyer's escrow account balance has fallen below

the amount owed to his client or a third party. See In Clarke, 684 A.2d 1276, 1280-81 (D.C.1996)(inferring intentional misappropriation when the attorney admitted that financial difficulties may have had an impact on the disappearance of client funds and when he failed to maintain adequate records).

Here, Respondent's bank records reveal not only that she allowed her escrow account balance to drop below what she owed Mr. Green, but also that she deliberately used his money for her own purposes. When she deposited his $2,000 and two checks totaling $4,400 from Capitol Bus on May 19, 1995, she withdrew $1,400 in cash without noting on the deposit slip which client's $1,400 was

withdrawn or why. BX 14 at 57. At the hearing, she claimed the $1,400 represented attorney's fees Mr. Green owed her; however, as discussed *supra*, that testimony is refuted by the record of her treatment of the $2,000.00 as Mr. Green's property. Tr.125.

The next day, Respondent wrote and $5,016.77 check to the IRS on behalf of Capitol Bus, even though she had received only $4,400 from that client the day before. BX 14 at 69.

Respondent claims that Capitol Bus provided her with additional money, but her bank records show no other deposits on behalf of that client around that time. Tr. 128-38. Just before Respondent deposited the Capitol Bus checks, her escrow

account balance stood at $336.77. BX 14 at 55. Thus at least $280 of Mr. Green's money went toward covering the difference between what she received from Capitol Bus and what she paid out to the IRS on its behalf.

Finally, when Mr. Green asked for $41,000 back, she was forced to deposit $1,000 of the money she had kept for her own purposes into her account before she could write him a check from her escrow account for that amount. BX 16 at 113, 125; Tr. At 150-51. If she believed that the $2,000.00 was, in fact, her funds, she would have drafted a $1,000.00 check form her personal or operating fund account.

Based on this evidence, the Committee concludes that Respondent intentionally

misappropriated Mr. Green's funds.[6] She not only diverted his money to cover a shortfall involving another client but also used almost three-fourths of it in cash before unexpectedly being asked for half

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[6] Even if it could be argued that Respondent did not intentionally misappropriate Mr. Green's money, she certainly acted recklessly - that is, with a conscious indifference for the security of that money. "Hallmarks" of reckless misappropriation include indiscriminate commingling of entrusted and personal funds; a total disregard of the status of accounts into which entrusted funds were placed, resulting in repeated overdrafts; and indiscriminate movement of monies between accounts. Anderson, 778 A.2d at 338; Carlson, 802 A. 2d at 348-49. By not detailing on the May 19, 1995 deposit slip why she withdrew $41,400 or from which source of funds she withdrew that money, and by allowing her escrow account balance to remain below the amount Mr. Green gave her - resulting in overdrafts - Respondent demonstrated a reckless disregard of the security of her client's funds.

of it back. This intentional misappropriation is the basis for the Committee's recommendation that Respondent be disbarred, as discussed in Part IV.

2. Rule 1.15(b): Failure to Deliver Funds or Render Accounting

Rule 1.15(b) requires a lawyer, after receiving funds or property "in which a client . . . has an interest," to "promptly deliver to the client . . . any funds or other property that the client . . . is entitled to receive and, upon request by the client . . . shall promptly render a full accounting regarding such property." Dist. Of Columbia Rules of Prof; Conduct R. 1.15(b);see, e.g., In Re Clower, 831 A.2d 1030, 1033 (D.C. 2003)(finding 1.15(b) violation when an attorney never informed a third

party about receiving settlement funds he was entitled to, nor delivered those funds, even after the oversight was brought to the attorney's attention); Pels, 653 A.2d at 396 (finding 1.15(b) violation when an attorney kept $432 due to a client out of his belief that the retainer agreement, providing that the client would pay administrative costs, entitled him to keep the money).

Mr. Green's June 17, 1996 letter to Respondent does not specifically request an accounting of the money he left for her in trust; therefore, Respondent did not violate this rule by failing to provide one. See BX 2 at 3. She did violate the rule, however, by not returning the remaining $1,000 in May 1995. Mr. Green gave her his

money; thus by definition he had an interest in it and was entitled to its return under Rule 1.15(b). Respondent herself advised in 1997 (as opposed today) that Mr. Green was entitled to a refund. BX 9 at 31-32. By June 1996, the purpose for holding the funds- to be used as part of negotiations to convince G.E.Capital not to foreclose on Mr. Green's condominium-had been rendered moot because the condominium had gone into foreclosure earlier that year. It should have been clear to Respondent that she needed to return the remaining $1,000 to Mr. Green when she learned that the condominium had gone into foreclosure- and certainly by the time Mr. Green file his complaint. Whatever justification Respondent may

have had for not initially responding to Mr. Green's letter (see Rule 1.4(a) discussion below), there is no excuse for not returning his money immediately. Thus, the Committee concludes that Respondent violated Rule 1.15(b).

3. Rule 1.16(d) Failure to Surrender Property After End of Representation

Rule 1.16(d) requires a lawyer, in connection with the termination of a representation, to "take timely steps to the extent reasonably practicable to protect a client's interests, such as...surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned." Dist. of Columbia Rules of Prof'l Conduct R. 1.15(d); see, e.g., In re Hallmark, 831

A.2d 366, 372 (D.C. 2003)(finding Rule 1.16(d) violation where attorney did not refund $1,000 that client paid her as a flat fee to file a motion to dismiss that the attorney never filed, even though she may have performed services in excess of $1,000 on an hourly basis); In Re Midlen, 885 A.2d 1280, 1290 (D.C. 2005)(finding 1.16(d) violation when attorney held on to a client's files for seven months after termination, in the face of four written requests for the files).

Mr. Green was entitled to the return of his $1,000. The question under Rule 1.16(d) is when Respondent's representation of Mr. Green ended. Mr. Green testified that he thought the attorney-client relationship ended when his condominium

went into foreclosure in early 1996. Tr. at 216. Respondent testified that she believed their relationship ended when his bankruptcy case was closed in late 1996. Tr. at 163. Bar Counsel agrees with Respondent. See Tr. at 177. Bar Counsel points out that Respondent did not attempt, after Mr. Green's case closed din December 1996, to calculate what funds she was holding on Mr. Green's behalf or what he owed her for her work. Bar Br. 26; Tr. at 164. Nor did she send Mr. Green an invoice at that time. Id. Ultimately, Bar Counsel points out, Respondent did not refund any of the remaining $1,000 of Mr. Green's money after his closed. Bar Br. 26-27.

Although Respondent believes her

representation ended when Mr. Green's case closed, she also testified that she believed she should not contact Mr. Green after Bar Counsel launched its investigation in October 1996. See Tr. at 91, 177. The Committee concludes that, for Rule 1.16(d) purposes, Respondent's representation of Mr. Green "terminated" in October 1996 and that she should have taken steps to return his $1,000 at that point. If she believed she could not contact Mr. Green directly at that point, she could have made arrangements with Bar Counsel to refund the money. To conclude otherwise would mean that whenever Bar Counsel informs an attorney that he or she is subject to a current client's complaint, that client's property would be frozen while Bar

Counsel investigates the complaint.[7]

4. Rule 1.15(a), D.C. Bar Rule XI § 19(F): Failure to Keep Complete Records

Rule 1.15(a) requires lawyers to keep "complete records of ...account funds and other property" and preserve them "for a period of five years after termination of the representation." Dist. Of Columbia Rules of Profl Conduct R. 1.15(a). The

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[7]To the extent that Respondent may have believed the $1,000 belonged to her as attorney's fees or that there was a legitimate question as to whose money it was, Respondent was still under an obligation to hold that money in trust while the dispute was resolved. See Dist. of Columbia Rules of Profl Conduct R. 1.16(d) cmt. 12 (requiring disputed money to be segregated from undisputed amounts and held in trust as required by Rule 1.15). Respondent has not argued that she did this, and nothing in the record suggests she took this step.

D.C. Bar Rules also require attorneys to "maintain complete records of the handling, maintenance, and disposition of all funds...from the time of receipt to the time of final distribution" and that they "shall preserve such records for a period of five years after final distribution of such funds." D.C. Bar Rule XI § 19(f).

Financial records are complete only when an attorney's documents are "sufficient to demonstrate [the attorney's] compliance with ethical duties." Clower, 831 A.,2d at 1035 (finding against a client's settlement funds and made out to third parties, would not have shown that the attorney handled client or third-party funds" and whether, for example, an attorney misappropriated

or commingled a client's funds. Id; see also Pels, 653 A.2d at 396 (finding 1.15(a) violation when attorney's showed a "pervasive failure" to maintain contemporaneous records accounting for the flow of client funds within various bank accounts). The records themselves should allow for a complete audit even if the attorney or client is not available. Clower, 831 A.2d at 1035 (noting that had the attorney or his client not been available to testify, the relevant documents would not have demonstrated that settlement disbursement checks were properly issued).

Here, the record demonstrates that Respondent utterly failed to comply with Rule 1.15(a) and D.C. Bar Rule XI § 19(f) record keeping requirements.

A number of transactions cannot be explained by reviewing her records. For example, Respondent deposited a $4,000 check drawn on her operating account into her escrow account and labeled the check as attorney's fees—but she failed to indicate which client's fees that money represented and why she was putting attorney's fees into her escrow in the first place. BX 14 at 61; Tr. at 148. Also, as discussed, she failed to indicate on a deposit slip whose money she was taking and why when she withdrew $1,400 from the gross deposit of $6,400 on May 19, 1995, and she failed to do the same five days later when she withdrew $1,000 from a gross deposit of $6,100. BX 14 at 61. She claims that Capitol Bus gave her enough money to cover a

$5,016.77 check she made out to the IRS on it behalf, but she was not able to provide any documents indicating that she received any more than $4,400 total from the company during that time period.

In September 1997, a year after she had moved offices and a little more than two years after receiving the $2,000 from Mr. Green, Respondent replied to a Bar Counsel request for records shedding more light on the financial transactions in Mr. Green's case by stating that she "she could not locate the requested materials or any other relevant materials." BX 10 at 35. This is textbook case of failing to maintain complete records and a clear violation of Rule 1.15(a).

5. Rule 1.4(a): Failure to Keep Client Informed

Rule 1.4(a) requires a lawyer to keep a client "reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Dist. of Columbia Rules of Prof'l Conduct R. 1.4(a). A client is entitled to "whatever information the client wishes about all aspects of the subject matter of the representation." Id cmt. 2. The lawyer must "imitate and maintain the consultive and decision-making process if the client does not do so and must ensure that the ongoing process is thorough and complete." Id.; see also Hallmark, 831 A.2d at 374; In re Hager, 812 A.2d 904, 915 (D.C. 2002) (finding 1.4(a) violation when attorney did not disclose key terms of a settlement

agreement with his class-action plaintiff clients); In re Bernstein, 707 A.2d 371, 376 (D.C. 1998)(finding a 1.4(a) violation when the attorney, dealing with deaths in the family and a marriage breakup, did not inform his clients that he had filed a lawsuit on their behalf until 18 months after the fact).

Whether attorney-client communication is adequate "depends in part on the kind of advice or assistance involved." Dist of Columbia Rules of Prof l Conduct R. 1.4(a) cmt 3. The "guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with (1) the duty to act in the client's best interests, and (2) the client's overall

requirements and objectives as to the character of representation." Id. Therefore, an attorney does not need to communicate with a client as often as the client would like, as long as the attorney's conduct is reasonable under the circumstances. In re Shoeneman, 777 A.2d 259, 264 (D.C. 2001) (finding no 1.4(a) violation when the attorney did not phone his client over a three-week period and the matter was a complex, long-term fraud investigation involving extended negotiations).

Although Respondent's communications with Mr. Green during her representation of him may not have been perfect, the Committee concludes that Bar Counsel has not proved by clear and convincing evidence that they were unreasonable

under the circumstances. Mr. Green conceded during his testimony that he was satisfied with his communications with Respondent at least until July, 1995, when he moved to New York City. Tr. at 266. Almost a year later, in July 1996, Mr. Green wrote Respondent, complaining that he had just heard that his condominium had gone into foreclosure during February of that year and that Respondent had not notified him. BX at 3. He also asked about the foreclosure's effect on his bankruptcy status, whether he owed money to his condominium association, and about the money he owed on his second trust. Id.

Mr. Green's letter makes it seem that he and Respondent were never in touch, but according to

the statement of services Respondent later included in her response to Bar Counsel's investigation, Respondent spoke with Mr. Green at least three times in 1996– in January, February, and April. BX 9 at 34. According to Respondent, she learned about the foreclosure sometime that spring (but not from Mr. Green's creditors) and thereafter spoke to his creditors to determine what could be done. BX 9 at 31.

Even if she never discussed the foreclosure during any telephone conversations with Mr. Green around that time, the Committee does not think her actions were unreasonable, given the nature of this case and Mr. Green's behavior throughout the representation. Mr. Green's case

was a simple bankruptcy matter, and beyond filing his case in the Bankruptcy Court, meeting with creditors, and getting a plan approved, there was not much further assistance or advice Respondent could provide; all that needed to happen was for Mr. Green to make his payments. Mr. Green acknowledged this during his testimony. Tr. at 258. He repeatedly failed to live up to his end of the bargain. Just months after Respondent filed the bankruptcy case, G.E. Capital filed a motion to lift the automatic stay because Mr. Green had failed to make payments. BX 17 at 134; BX 18 at 162. Then, just months after Respondent successfully negotiated a consent decree, G.E. Capital informed the court that Mr. Green was in

breach of his new payment obligations, and in March 1995 the court lifted the stay because Mr. Green failed to cure the breach. BX 17 at 134; BX 18 at 165-68. In August 1995, Mr. Green's condominium association revealed that Mr. Green had not paid his monthly assessments for that year and said it would also seek relief from the Bankruptcy Court if no payment was forthcoming. Respondent's Exhibit ("RX") B" BX 18 at 184. Given his own repeated failures to make various payments, it is not credible that Mr. Green was unaware that his condominium would have gone into foreclosure and that it in fact did go into foreclosure. It would also be unreasonable to expect Respondent to remain in constant contact

with Mr. Green to push im to meet his payment obligations.

Beyond the failures to make payments, Mr. Green displayed an overall level of irresponsibility with respect to his case and his property that further makes Respondent's level of communication with him reasonable under the circumstances. For example, Mr. Green said he would provide $5,000 to Respondent for her to try to convince G.E. Capital not to move ahead with foreclosure, but he only provided $2,000. Tr. 114-17; BX 9 at 34. He seemed to expect Respondent to work a miracle with that $2,000 (and then a few weeks later, only $1,000)–she was supposed to secure a forbearance agreement with that amount

as leverage against the tens of thousands of dollars the condominium was worth. After moving to New York City, Mr. Green left his condominium in the hands of a management company, but he does not remember how much in rent he collected or even how that rent money was used. Tr. 278-79. Although living in New York City, he gave Respondent his parent's New Jersey address and phone number to use. Respondent did attempt to reach Respondent at least three different locations in the New York/New Jersey area. Tr. at 264. Mr. Green also expected Respondent to negotiate a reduction in his bankruptcy payments to $100 a month. RX D; Tr. 242-43. Working with a difficult client who did not appear to take his obligations

seriously, it is understandable that Respondent would not have able to sort through his case and provide a complete response when he asked about his foreclosure status of his case in June 1996. The evidence is not clear and convincing that Respondent's communications were inadequate.

C. **Count II Charges: Respondent's Response to Bar Counsel's Investigation**

These charges alleged that Respondent:

(1) Seriously interfered with the administration of justice in violation of Rule 8.4(d);

(2) Knowingly failed to respond reasonably to a lawful demand for information from a disciplinary authority in violation of Rule 8.1(b); and

(3) Failed to comply with an order of the Board

in violation of D.C. Bar Rule § 2(b)(3).

The Committee concludes that Bar Counsel failed to prove by clear and convincing evidence that Respondent violated Rule 8.4(d) but did prove that she violated Rule 8.1(b) and D.C. Bar Rule XI§ 2(b)(3).

1. Rule 8.4(d): Interference with the Administration of Justice

Rule 8.4(d) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct that seriously interferes with the administration of justice." Dist. of Columbia Rules of Prof l Conduct R. 8.4(d). To establish a Rule 8.4(d) violation, Bar Counsel must prove by clear and convincing evidence that (1) the attorney took improper action

or failed to take required action, (2) the conduct involved bears directly on the judicial process in an identifiable case or tribunal, and (3) the conduct taints the judicial process to a serious and adverse degree. See In re Owusu, 886 A.2d 536, 540 (D.C. 2005); In re Hallmark, 831 A.2d 366, 374 (D.C. 2003); In re Travers, 764 A.2d 242, 248 (D. C. 2000).

Failures to respond to Bar Counsel's inquiries or subpoenas may constitute misconduct under Rule 8.4(d). Dist. of Columbia Rules of Prof l Conduct R. 8.4(d) cmt. 3; see, e.g., In re Karr, 722 A.2d 16, 22 (D.C. 1998)(finding 8.4(d) violation when attorney ignored multiple letter sent to him by Bar Counsel in connection with disciplinary

matters and when he admitted the violation): In re Cater, 887 A.2d 1, 17 (D.C. 2005)(finding 8.4(d) violation when attorney failed to respond to repeated Bar Counsel letters and orders of the Board of Professional Responsibility). Bar Counsel cites many similar cases and argues that Respondent's failure to submit a written response to his October 1996 letters of inquiry and failure to timely respond to the Board's February 1997 order amounts to Rule 8.4(d) violation. Br. 28-29.

Respondent may have failed to provide a timely written response to Bar Counsel's written inquiries and an investigation by Bar Counsel is part of the judicial process. See Owusu, 886 A.2d at 541 (citing In re Hopkins, 677 A.2d 55 at 61 n.10 (D.C.

1996)). Nevertheless, given the *de minimus* standard set forth in Owusu, Hallmark, and Travers, the Committee concludes that Respondent's delay in 1996 and 1997 in submitting a written response does not amount to "seriously" interfering with the administration of justice. There is no indication that Respondent deliberately ignored Bar Counsel's letters or acted dishonestly, and she in fact did reach out to Bar Counsel in an attempt to discuss her response. She phoned Bar Counsel's office and also met with Assistant Bar Counsel in November 1996 to discuss her situation, and the following month she explained the reasons for her delay, citing numerous health problems, her recent office move, and increased pressures after

becoming a solo practitioner. BX 5; BX(b) at 23. Although she may have brought much of the disarray upon herself, she did not try to interfere with Bar Counsel's investigation and did, in fact, make some attempts at communication. In short, Respondent did not "cavalierly disregard requests for responses from Bar Counsel," nor did she "willfully ignore and frustrate" Bar Counsel's efforts. See In re Steinberg, 761 A.2d 279, 283 (D.C. 2000)(adopting Board report); see also Owusu, 886 A.2d at 542 (noting that attorney's failure to update his address was not intended to impede Bar Counsel's investigation). Her actions did not affect Bar Counsel's investigation to a serious and adverse degree.

For the reasons discussed in the next sections, Respondent's failure to comply with the Board's order is not excusable, but the Committee nonetheless finds that in this case it does not rise to the level of a 8.4(d) violation. Although the Board's order was hand-delivered to Respondent and she still failed to respond, she did not demonstrate an " intentional disregard for the effect that an action may have on judicial proceedings or the client's cause." See Hallmark, 831 A.2d at 375 (citing examples of such disregard, including fabricating evidence, forging a client's signature, concealing a client's assets, and deliberately failing to file a client's appeal). Again, the Committee does not believe that Respondent

intended to Bar Counsel's investigation, and, for all intents and purposes, her client's cause was moot at that point: Mr. Green's condominium had already gone into foreclosure, his bankruptcy case had been dismissed; and, although the status of his $1,000 was still in doubt, he apparently was in no hurry to get it back because he had never specifically asked for it back. See BX 2 at 3; Tr. 262. Thus, this failure to comply did not "seriously interfere" with the administration of justice.

2. Rule 8.2(b): Failure to Respond to Disciplinary Authority

Rule 8.1(b) provides, in relevant part, that an attorney shall not " knowingly fail to respond reasonably to a lawful demand for information

from ... a disciplinary authority." Dist. of Columbia Rules of Prof l Conduct R. 8.1(b). Unlike " the more general requirements of Rule 8.4(d), " Rule 8.1(b) " specifically addresses the requirement of responding to Bar Counsel." In re Rivlin, Bar Docket Nos. 436-96, et al., at 41 n. 20 (D.C. Bd. on Prof l Responsibility Oct. 28, 2002), aff'd In re Rivlin, 85p6 A.2d 1086 (D.C. 2004). In addition, failure to comply with Board orders can also subject an attorney to discipline under Rule 8.1(b). See In Re Cater, 887 A.2d 1, 17 (D.C. 2005); In re Beller, 802 A.2d 340 (D.C. 2002)(per curium).

As discussed, Respondent's initial delay in providing Bar Counsel with a written response can be justified in light of the health and office

challenges with which she was dealing at the time and the fact that she did reach out to Bar Counsel by phone and in person to try to discuss her response. Although she may have acted "reasonably" at the outset, her failure to respond became unreasonable as the months accumulated. Through Bar Counsel's letters and telephone conversations, Respondent knew that Bar Counsel was determined to pursue the investigation and seek a Board order if necessary to compel a response. Despite this notice, she delayed in doing what was necessary to recover and examine the files she possessed regarding Mr. Green's representation.

It was only by December 1996, three months

after receiving Bar Counsel's initial letters, that Respondent informed Bar Counsel that she had sought assistance in reviewing her files and providing a response. BX 6(b) at 23. Yet she still did not provide a response, even after she spoke with Bar Counsel's office the next month and was told a motion to compel was imminent. See BX5. After Bar Counsel filed that motion in January 1997, she sis not provide a response; nor did she when the Board granted the motion the next month. It was only at this point that Respondent had re-hired her secretary in an effort to help her manage her office and workload, which she had difficulty doing as a solo practitioner and which was partly to blame for her failure to respond. BX

6(b) at 21.

Even after bringing in assistance, Respondent sis did not respond within the ten days provided for in the Board's order. It appears that Respondent only began to prepare a response in earnest after Bar Counsel filed it first petition and specification of charges in this matter in March 1997. BX 8. Despite that, after a month had passed, the attorney Respondent had retained to represent her asked for even more time to file an answer and to postpone a scheduled hearing. Finally, on April 30, 1997, Respondent provided her written response. BX 9.

Given these extensive delays and apparent lackadaisical approach toward resolving the issues

that kept her from being able to respond, and the clear requirements of Rule 8.1(b), the Committee concludes that Respondent knowingly failed to respond reasonably to Bar Counsel's inquiries.

3. D.C. Bar Rule XI § 2(b)(3): Failure to Comply with an Order of the Board

D. C. Bar Rule XI§2(b)(3) states that an attorney is subject to discipline for "[failure to comply with any order of . . . the Board issued pursuant to the rule." D.C. Bar R. XI§ 2(b)(3); see also In re Kaufman, 878 A.2d 1187,1188 (D.C. 2005)(per curium)(involving attorney who did not comply with the Board's order to respond to Bar Counsel's inquiries); In re Burnett, 878 A.2d 1291,1292 (D.C. 2005)(per curium)(involving

attorney who did not participate in Board proceedings after ignoring Bar Counsel charges against him); In re Artis, 883 A.2d (D.C. 2005)(involving attorney who ignored a Board order compelling him to respond to Bar Counsel's interrogatories).

As discussed, Respondent did not comply with the Board's February 12, 1997 order to respond to Bar Counsel within 10 days, and she eventually responded months later– after a specification of charges was filed against her and a hearing date was set. Thus, she also violated D.C. Bar R. XI § 2(b)(3).

IV. RECOMMENDED SANCTION

Because the law is clear that misappropriation can result in the most severe possible penalty disbarment - the Committee focuses its sanction discussion on this charge and concludes that disbarment is the proper sanction here.

As discussed in Part iii, the D.C. Court of Appeals has consistently held that "in virtually all cases of misappropriation," disbarment is warranted if the misappropriation stems from "anything more than simple negligence." See Addams, 579 A.2d at 191. This is not a per se rule, but rebutting the presumption of disbarment is an uphill battle; a lesser sanction is appropriate only in "extraordinary circumstances." Id.; see also

Pels, 653 A.2d at 397-98 (holding that an attorney's inexperience in personal injury representation, the fact that his client was not disadvantaged,. and that small dollar amounts were at stake were not "extraordinary" circumstances). One such mitigating circumstances is if an attorney's bad conduct was at least partly involuntary due to certain disabilities, such as alcoholism. Id, at 194-95 (citing In re Kersey, 520 A.2d 321 (D.C. 1987)). However, "as a matter of course, the mitigating factors of the usual sort . . . will suffice to overcome the presumption of disbarment only if they are especially strong and, where there are aggravating factors, they substantially outweigh any

aggravating factors as well." Id. at 191 (citing In re Reback, 513 A.2d 226, 233 (D.C. 1986)). The burden is high because misappropriation is a breach of trust that strikes "at the core of the attorney-client relationship." Id. At 198-99.

A. Mitigating and Aggravating Factors

Mitigating factors " of the usual sort" include: (1) an admission of wrongdoing, (2) full cooperation with disciplinary authorities, (3) prompt return of disputed funds, and (4) an unblemished record of professional conduct. See In re Pierson, 690 A.2d 941, 950 (D.C. 1997) (citing Reback, 513 at 233). Respondent can rely on none of these. She did not admit any wrongdoing, but instead denied all the charges Bar Counsel brought against her. She did

not cooperate fully with authorities, but instead delayed in preparing a written response to Bar Counsel's initial inquiries and failed to comply with a Board order. She did not promptly return disputed funds, but instead held ion to Mr. Green's remaining $1,000 even after his condominium had gone into foreclosure and could no longer be used as a bargaining chip. She does not have an unblemished record of professional conduct, but instead is currently serving a six-month suspension for negligently misappropriating another client's funds, for filing to maintain complete records, and for other violations. See In re Edwards, 870 A.2d 90, 92 (D.C. 2005); Bar Br.

37; Resp't 10.[8] In addition, while the Committee was preparing this Report and Recommendation, another hearing committee issued a report recommending that Respondent be suspended for thirty days based on ethical violations resulting from her inability to locate a client's will after his death. See Bar Docket No. 448-02 (D.C. Bd. On Prof'l Responsibility Hr'g Comm. No. 2, July 5, 2006).[9]

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[8] The six-month suspension actually began in September 2005 and should have ended by now, but there is a dispute over whether Respondent properly filed an affidavit pursuant to D.C. Bar R. XI, § 14(g), which affects the timing of reinstatement. Bar Br. 37; Resp't Br. 10.

[9] Although this other case has only reached the stage of a Hearing Committee

The mitigation issues Respondent does raise are either irrelevant, unpersuasive, or dubious. During the mitigation phase of the hearing, for example, she testified that a fire set in a building next to her Georgia Avenue office destroyed much

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recommendation, the Committee believes it is allowed to consider it as a part of its sanctions recommendation based on the District of Columbia Court of Appeal's statement that "[t]he appropriate question which the Board must ask and answer when different cases are at different steps of the disciplinary process ... is simply this: if all of the matters were before the Board simultaneously, what would we recommend as the appropriated discipline?" In re Thompson, 492 A.2d 866, 867 (D.C. 1985). Even if the Committee was not permitted to consider this other ongoing matter, it would have no effect on its conclusion that Respondent be disbarred based on her intentional misappropriation and the lack of "extra ordinary circumstances" here.

of her own office and files - but that fire occurred April 2004. Tr. 322, 330-31. Also in 2004, Respondent suffered a heart attack and the death of her husband. Tr. 320-21. While the Committee sympathizes with Respondent, it notes that these traumas took place ten years after Respondent first began representing Mr. Green.

Closer to the time in question, Respondent testified that she has dealt with numerous health problems, including glaucoma, chronic migraine headaches, sinus problems, and upper respiratory problems. Tr. 319-21. Also, during that time period, she and her husband faced marital difficulties, and her husband suffered a hear attack. Tr. 318. The Committee concludes that

these circumstances are not "extraordinary" in the Addams sense; they are simply the types of difficulties many people face during their lifetimes and cannot be the basis for lessening sanctions for a violation as serious as intentional misappropriation.

Respondent also testified that her Georgia Avenue office suffered a flood soon after she moved there in 1996 and around the time she began receiving Bar Counsel's inquires in this matter. Tr. 332-33. This event could not have had any bearing on Respondent's misappropriation, as that took place more than a year earlier, in the summer of 1995. Although a flood could have affected her ability to respond to Bar Counsel's inquires and

comply with Board's order, Respondent made no mention of a flood in her December 20, 1996 faxed letter to Bar Counsel's allegations. BX 6(b) at 23; BX 9. The Committee concludes that if a flood had affected Respondent's ability to cooperate with the investigation, she would have mentioned it; thus, the flood evidence has no mitigating effect on the ethical violations Respondent committed.

Respondent also now argues for the first time that the ten-year delay in adjudicating this matter "is unreasonable by any standard" and therefore requests ta no additional discipline be imposed on her than what has already been imposed. Resp't Br. 4. This is wholly unpersuasive, as Respondent fails to acknowledge that she is the cause of much

of this delay. She was slow in providing an initial response to Bar Counsel's October 1996 inquiries; she filed a motion to quash a Bar Counsel subpoena in 1998 that was not decided until October 2001 (after which she filed a motion for reconsideration); and she was slow again in answering the current specification of charges Bar Counsel filed in October 2005, waiting until May 2006 to do so. Bar Br. 13; BX D. Respondent argues that because she has had to defend against two other disciplinary charges originating from the same time period, this somehow excuses the delays she has created in this case. Resp't Br. 4. The Committee does not believe that the accumulation of disciplinary charges can ever be a factor in

mitigation.

B. Sanctions

As is apparent from the foregoing discussion, the mitigating factors Respondent sets forth cannot overcome the presumption of disbarment for intentional misappropriation because they are not "especially strong" but very weak.. Nor do they outweigh the aggravating factor that Respondent now has a history of past ethical violations. Thus, the Committee recommends that Respondent be disbarred from the practice of law in the District of Columbia.

Additionally, the Committee notes that Respondent has held on to Mr. Green's $1,000 since her representation of him ended in 1996. The

Committee recommends that she pay restitution in that amount plus interest at the legal rate, as has been done in other cases in which attorneys have improperly held on to clients' money. See In re Steele, 868 A.2d 146, 155 (D.C. 2005). The Committee notes that Respondent remains free to pursue Mr. Green's payment for services she may have provided beyond the amounts he has already paid her in legal fees.

V. Conclusion

The Committee concludes that Bar Counsel has proven by clear and convincing evidence that Respondent intentionally misappropriated client funds in violation of Rule 1.15(a); failed to maintain complete financial records in violation of

Rule 1.15(a) and D.C. Bar Rule XI, §19(f); failed to deliver to a client money he was entitled to in violation of Rule 1.1(b); failed to surrender property to a client property he was entitled to in violation of Rule 1.16(d); failed to respond to a lawful demand for information from a disciplinary authority in violation of Rule 8.1(b), and failed to comply with an order of the Board in violation of D.C. Bar Rule XI § 2(b)(3). The Committee concludes that Bar Counsel did not prove by clear and convincing evidence that Respondent failed to keep a client reasonably informed in violation of Rule 1.4(a) or that she seriously interfered with the administration of justice in violation of Rule 8.4(d).

Based on these violations the Committee

recommends that Respondent be disbarred and that she pay restitution of $1,000 plus interest.

HEARING COMMITTEE NUMBER ONE

/s/ Robert F. Reklaitis
Robert F. Reklaitis, Esquire
Chair

/s/ La Verne Fletcher
La Verne Fletcher,

/s/ John C. Yang, Esquire
John C. Yang, Esquire,

Dated: DEC 26 2006